Supreme Court, U.S.
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No. _____

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In The
Supreme Court of the United States

ANN S. AZDELL AND DONALD B. FISHMAN,

Petitioners,

v.

KAY COLES JAMES, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 22, 2003

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202 pp

QUESTION PRESENTED

Section 7701(c)(2)(C) of Title 5 of the United States Code provides, in relevant part, that the United States Merit Systems Protection Board (MSPB) "may not" sustain on appeal an agency decision that is "not in accordance with law." The question presented is:

Whether the court of appeals erred in holding that, notwithstanding the MSPB's authority under Section 7701(c)(2)(C), the MSPB is required to sustain an agency decision on appeal even though the MSPB determines that the agency's employment decision was not in accordance with a federal statute.

PARTIES TO THE PROCEEDING

Petitioners Ann S. Azdell and Donald B. Fishman instituted the administrative appeal to the Merit Systems Protection Board (MSPB) in this case. The Office of Personnel Management (OPM) was the responding agency in that proceeding. Petitioners' unopposed motion that the case proceed as a class action was granted by the MSPB and that class comprises "all non-preference eligible candidates who were on the [administrative law judge] register as of February 7, 1997." App., *infra*, 80a. Several individuals, including Murray M. Meeker, F. William Roggeveen, Jay E. Levine, and William S. Colwell, were granted leave to intervene in that proceeding. Kay Coles James, in her official capacity as the Director of OPM, sought review of the MSPB's order in the United States Court of Appeals for the Federal Circuit. The individual intervenors also sought such review. The MSPB was listed as the respondent before the Federal Circuit, and petitioners, who also were respondents in that proceeding, were listed as intervenors. OPM, the MSPB, and the individuals who intervened before the MSPB and participated in the Federal Circuit are respondents in this Court pursuant to this Court's Rule 12.6.

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PETITION FOR A WRIT OF CERTIORARI

Ann S. Azdell and Donald B. Fishman respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Federal Circuit (App., *infra*, 1a-24a) is reported at 319 F.3d 1368 (2003). The opinion of the Merit Systems Protection Board on the merits (App., *infra*, 64a-129a), is reported at 87 M.S.P.R. 133 (2000), and its opinion denying respondent Office of Personnel Management's request for reconsideration (App., *infra*, 28a-63a) is reported at 89 M.S.P.R. 88 (2001). The decisions by the chief administrative law judge are not officially reported, but his initial decision on the merits is available at 1999 MSPB LEXIS 1775 (1999).

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2003. The court of appeals denied two petitions for rehearing on July 3, 2003. App., *infra*, 130a-133a. On September 23, 2003, the Chief Justice extended the time for filing a petition for a writ of *certiorari*, to and including October 22, 2003. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7701 of Title 5, United States Code, provides, in relevant part:

> § 7701. Appellate procedures
>
> (a) An employee, or applicant for employment, may submit an appeal to the Merit Systems

Protection Board from any action which is appealable to the Board under any law, rule, or regulation. . . .

(b)(1) The Board may hear any case appealed to it. . . .

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision –

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment –

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

* * *

5 U.S.C. § 7701(a), (b), (c) (West 1996 & Supp. 2003). Other relevant provisions of 5 U.S.C. § 7701 are set forth at App., *infra*, 138a-140a.

Section 3309 of Title 5, United States Code, part of the Veterans' Preference Act, provides, in relevant part:

§ 3309 Preference eligibles; examinations; additional points for

> A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to [an] additional [5 or 10] points above his earned rating.

Section 3309 is set forth in full at App., *infra*, 140a -141a.

Section 300.104 of Title 5, Code of Federal Regulations, provides in relevant part:

> § 300.104 Appeals, grievances and complaints.
>
> (a) *Employment practices.* A candidate who believes that an employment practice which was applied to him or her by the Office of Personnel Management violates a basic requirement in § 300.103 is entitled to appeal to the Merit Systems Protection Board under the provisions of its regulations.

Other relevant provisions of Title 5 of the Code of Federal Regulations regarding the Office of Personnel Management and federal employment practices, 5 C.F.R. §§ 300.101 to 300.104, and its regulatory authority, 5 C.F.R. § 5.1, are set forth at App., *infra*, 138a-145a.

INTRODUCTION

This case arises out of an administrative appeal brought by petitioners on behalf of a class of individuals who had applied for positions as federal administrative law judges (ALJs). Petitioners challenge an employment practice of the Office of Personnel Management (OPM) that was applied to them in 1996 and drastically lowered their rankings (and the rankings of more than 1700 other applicants) on OPM's register for ALJ candidates. That rank order register determines which ALJ candidates' names are referred for employment consideration to federal agencies. The challenged employment practice arose from OPM's change in the scoring formula that it

uses to evaluate ALJ applicants. OPM's new 1996 scoring formula unlawfully increased the weight of preference points awarded to eligible veterans and relatives of veterans under the Veterans' Preference Act (VPA), 5 U.S.C. § 3309, nearly tripling the weight of those points and thereby displacing exceedingly more qualified candidates on the ALJ register, contrary to the intent of Congress.

The Merit Systems Protection Board (MSPB), pursuant to its duties under 5 U.S.C. § 7701(c), refused to sustain application of OPM's new scoring formula, concluding that it violated OPM's regulations and the VPA. The United States Court of Appeals for the Federal Circuit reversed, holding that the new formula did not violate the regulations because it was lawfully adopted pursuant to a regulatory variance, and holding that the MSPB "lacked jurisdiction to review the challenge to the scoring formula based on the Veterans' Preference Act." App., *infra*, 2a.

The court of appeals' ruling restricting the authority of the MSPB to review a challenge to an agency decision based on an alleged violation of a federal statute is contrary to the plain meaning of the statute governing MSPB authority, which expressly provides that an agency decision "may not be sustained" by the MSPB on appellate review if the employee "shows that the decision was not in accordance with law." 5 U.S.C. § 7701(c)(2)(C) (West 1996 & Supp. 2003). Left unreviewed, the decision of the Federal Circuit will mean that the MSPB is required to sustain federal employment decisions notwithstanding the fact that the employee or applicant has shown that the decision violated a federal statute. The decision necessarily has a wide-ranging impact on all appeals to the MSPB from agency employment decisions that allegedly violate federal statutory law, not just cases involving the VPA. Even with regard to the VPA, the ruling would have the unacceptable consequence that a veteran will not be able

to obtain relief from the MSPB on appeal from a federal agency's employment decision that diminishes the value of veterans' preference points in violation of the VPA. Because the Federal Circuit is the only lower court with authority to review MSPB rulings, the decision below (fortified by the Federal Circuit's denial of the MSPB's rehearing *en banc* petition (*see* App., *infra*, 146a-164a)), will be the last word on the matter unless reviewed by this Court.

STATEMENT

A. Statutory and Regulatory Framework

OPM is authorized by Congress to promulgate regulations governing competitive civil service positions, including examination and selection procedures for ALJs which are set forth at 5 C.F.R. § 930.201 *et seq*. OPM's regulations explicitly provide that any candidate for such a civil service position who "believes that an employment practice which was applied to him or her by [OPM] violates a basic requirement in § 300.103 is entitled to appeal to the Merit Systems Protection Board under the provisions of its regulations." 5 C.F.R. § 300.104(a). For purposes of these regulations, the term "employment practice" "includes the development and use of examinations, qualification standards, tests, and other measurement instruments." 5 C.F.R. § 300.101.[1]

[1] The basic requirements in Section 300.103 generally are (1) that each employment practice of the Federal Government and its agencies be based on a job analysis to identify the basic duties of a job, the knowledge, skills and abilities required to perform such duties, and to identify the factors important in evaluating candidates; (2) that there be a rational relationship between performance in the position and the

(Continued on following page)

Congress set forth the appellate jurisdiction of the MSPB to review such appeals from federal agency employment decisions. Congress provided that any federal employee or applicant "may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the [MSPB] under any law, rule, or regulation." 5 U.S.C. § 7701(a). And Congress also unequivocally stated that the MSPB "may hear any case appealed to it." 5 U.S.C. § 7701(b)(1).

Congress further directed that the decision of an agency generally "shall be sustained" on appeal to the MSPB if that decision is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). Congress further specified, however, that notwithstanding that provision, "the agency's decision *may not be sustained*" on appeal to the MSPB if the employee or applicant "(A) shows harmful error in the application of the agency's procedures in arriving at such decision; (B) shows that the decision was based on any prohibited personnel practice described [in 5 U.S.C. § 2302(b)]; or (C) shows that the decision *was not in accordance with law*." 5 U.S.C. § 7701(c)(2) (emphasis added). Section 7701 also specifically refers to the MSPB's "interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management" and provides that, when such an interpretation or application is at issue, notice to the Director of OPM is required and her participation is allowed. 5 U.S.C. § 7701(d)(1)(A), (B).

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employment practice used, including a showing that the practice was professionally developed; and (3) that an employment practice not discriminate on the basis of nonmerit factors. 5 C.F.R. § 300.103(a), (b), (c).

B. Factual and Procedural Background

1. a. OPM's regulations require that an applicant for an ALJ position demonstrate that he or she meets the minimum qualifications for the position by having seven years experience as an attorney in administrative law or litigation, including two years senior level experience. App., *infra*, 67a-68a; *see* 5 C.F.R. § 930.203(b). A candidate who meets those minimum qualifications is evaluated based on a professionally validated ALJ examination that consists of four parts: a supplemental qualifications statement; a demonstration of writing ability; a panel interview; and a personal reference inquiry. App., *infra*, 66a; 5 C.F.R. § 930.203(c), (d).

Following completion of the examination process, ALJ candidates who receive passing scores on the examination are placed on a register in order of ranked scores, from highest to lowest score. When ALJ positions become vacant, a federal agency that wants to fill those positions sends OPM a request for a certificate of eligible ALJ candidates. OPM must provide three names, from the top ranks of the register, for each vacant position. OPM lists those names in rank order on a certificate of eligible candidates which it forwards to the federal agency for consideration, selection and appointment to ALJ positions. *See* 5 U.S.C. § 3317(a); App., *infra*, 69a; 5 C.F.R. § 930.203(f). Once appointed, ALJs hold hearings and render decisions affecting rights, benefits and interests across the government. *See* 5 U.S.C. § 3105.

b. Before 1996, OPM scored the four-part ALJ examination by first converting the raw scores achieved by an applicant on each part of the examination to a weighted score for each part, and then transmuting the sum of those scores to an approximate 100-point scale by adding 10.9 points. App., *infra*, 70a-71a. Under that scoring formula,

except for the addition of 10.9 points (which were added to bring all final scores up to at least the passing score of 70 as set by OPM), all points on the 100-point scale were competitively earned by the candidates through their performance on the four-part examination. After that final score was determined, each applicant with a final passing score who was entitled to a veteran's preference under the VPA, 5 U.S.C. § 3309, had his or her final passing score augmented as appropriate, *e.g.*, an additional 10 points was awarded to a disabled veteran and to a widow or widower of a veteran who served in war time, and an additional 5 points was awarded to a veteran who served in war time. *See* 5 U.S.C. § 3309(1), (2) (referencing 5 U.S.C. §§ 2108(3)(C)-(G), 2108(3)(A)-(B)); 5 C.F.R. § 930.203(e).

In 1996, however, OPM rescored various portions of the ALJ examination in response to an investigation concerning the possible forgery of the rating officials' signature on numerous supplemental qualification statements. *See* App., *infra*, 4a, 71a. After the re-scoring, OPM found that "approximately 80% of the applicants fail[ed] to achieve a final weighted score of at least 70." App., *infra*, 72a. OPM then concluded that its current scoring formula "wouldn't work," App., *infra*, 72a, because its addition of 10.9 points would not ensure that all applicants achieved a score of 70 or higher. *Ibid.*

Erroneously believing that it was required by law to award a passing score of 70 to every applicant who met the minimum qualifications and had completed all four parts of the examination, regardless of the results of the examination, App., *infra*, 46a-48a, OPM substantially changed the scoring formula for ALJ applicants to guarantee that all applicants achieved at least a score of 70. It did this by simply awarding 70 points to *every* applicant who satisfied the minimum requirements of experience and merely

completed the examination. App., *infra*, 4a. OPM also changed the method by which it transmuted an applicant's weighted score on the examination to a final score. *Id.* Instead of merely increasing the total weighted examination score by 10.9 points as it had under the prior scoring formula, OPM decreased the total weighted score by multiplying it by 0.3, thereby compressing it by approximately two-thirds. *Id.* Thus, under the new formula, "the scores on the four graded portions of the examination ranged from 0 to 30 points, rather than from 0 to 100 points as had been the case under the 1993 formula." App., *infra*, 4a-5a. After the score on the four-part examination had been thus compressed and the 70 points awarded across the board, OPM awarded the veterans' preference points, either 5 or 10 points according to the nature of the preference. *Id.* at 5a.

OPM's new 1996 scoring formula was not in accordance with OPM's regulations, 5 C.F.R. § 930.203(e). Therefore, OPM exercised its authority under 5 C.F.R. § 5.1 to grant itself a variation from its regulations. App., *infra*, 73a & n.6; *id.* at 75a.

c. On June 18, 1996, OPM applied the new scoring formula, through a computer program, to all candidates then on the ALJ register. App., *infra*, 78a. On that single day, OPM thereby altered the relative rank order of well over 1000 candidates on the ALJ register. Under the new scoring formula, candidates who had been awarded an additional 5 or 10 points because of their eligibility for a preference as a veteran or relative thereof (*i.e.*, known as "preference eligible" candidates) moved up to the first several hundred slots on the register, whereas under the prior scoring formula, preference eligible candidates had been dispersed throughout the register. App., *infra*, 75a, 102a-103a. The dramatic shift in position for preference eligible candidates was due to the fact that, under the new

formula, only 30 points of a candidate's score was attributable to the competitive four-part examination. The other 70 points were awarded to everyone who took the examination. Thus, the addition of 5 or 10 preference points to the new 30-point scale substantially increased the weight of those points in determining the rank of all preference eligible candidates on the register.

2. a. On February 7, 1997, petitioners Ann S. Azdell and Donald B. Fishman filed individual appeals with the MSPB pursuant to 5 C.F.R. § 300.104(a), contending, *inter alia,* that, through its new scoring formula for ALJ candidates, OPM had implemented an employment practice that violates the basic requirements of 5 C.F.R. § 300.103, as well as the Veterans' Preference Act. Both Azdell and Fishman had been highly ranked candidates on the ALJ register prior to June 1996, but the application of OPM's new scoring formula significantly lowered their rankings because neither of them is entitled to preference points. The appeal was assigned to the MSPB's Chief Administrative Law Judge who granted petitioners' unopposed motion that the matter be adjudicated as a class appeal pursuant to 5 C.F.R. § 1201.27, and the case has proceeded with Azdell and Fishman as representatives of a class of more than 1200 ALJ candidates designated as a class of "all non-preference eligible candidates who were on the ALJ register as of February 7, 1997." App., *infra*, 80a.

On April 22, 1999, the MSPB's Chief Administrative Law Judge declined to sustain OPM's actions and entered a decision finding that OPM's actions violated OPM's regulations because OPM failed to demonstrate that its employment practice was based on a job analysis as required under 5 C.F.R. § 300.103(a), or that it complied with the requirement that there be a rational relationship between the employment practice and performance in the position, pursuant to 5 C.F.R. § 300.103(b). He found that

OPM's action also violated the regulations because OPM used a nonmerit factor as part of the selection process in violation of 5 C.F.R. § 300.103(c), and that OPM's regulatory variation was not properly granted. He also rejected OPM's argument that its 1996 scoring formula is required under the VPA, and ruled that OPM's new scoring formula violated the VPA. He rejected various other challenges to the OPM action. *Azdell v. OPM*, 1999 MSPB LEXIS 1775 (Dkt. Nos. DC-300A-97-0368-I-1, -0369-I-1 (1999)). On September 23, 1999, he entered a decision regarding the appropriate remedy. *Azdell v. OPM*, Dkt. Nos. DC-300A-97-0368-I-2, -0369-I-2.

b. The three-member MSPB granted in part OPM's petition for review of the Chief ALJ decision.[2] The MSPB vacated the Chief ALJ's decision to the extent it had invalidated OPM's variation, without resolving that issue, App., *infra*, 98a n.20, and reversed to the extent the decision found that the employment practice violated 5 C.F.R. § 300.103(c), ruling that preference eligibility is not a nonmerit factor. App., *infra*, 90a, 110a-111a. The MSPB affirmed the remainder of the decision on the merits and affirmed, as modified, the relief decision, App., *infra*, 66a, 90a-91a, 112a-120a.

On the merits, the MSPB first rejected OPM's argument that OPM's change and use of the new scoring formula was not an "employment practice" under 5 C.F.R.

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[2] OPM filed a cross-petition for review because certain individuals who had been allowed to intervene following the Chief ALJ's merits decision, App., *infra*, 83a, already had filed a joint petition for review. The MSPB denied the remainder of OPM's cross-petition, and also denied the joint petition for review, as well as the cross-petition for review filed by petitioners and a cross-petition filed by other intervenors. App., *infra*, 65a.

§ 300.104, and thus not appealable to the MSPB under 5 U.S.C. § 7701(a). The MSPB found that, under OPM's new 1996 scoring formula, "applicants were eligible for inclusion on the ALJ register if they met the qualifying experience requirements and completed the examination process, *regardless of their scores*" on the four-part competitive ALJ examination, App., *infra*, 88a (emphasis added), contrary to OPM's prior scoring formula. The MSPB further explained that although, under the OPM's prior regulations, "an applicant's score on the ALJ examination determines his final unaugmented rating," that examination score "accounted for only 30% of the available rating points under the 1996 scoring formula." *Id.* The MSPB therefore concluded that application of the 1996 scoring formula constituted an employment practice for purposes of 5 C.F.R. Part 300, Subpart A, because it "changed the means by which applicants qualified for inclusion on the ALJ register, and it also changed the use of the four parts of the ALJ examination that applicants were required to complete in order to compete for ALJ vacancies." App., *infra*, 88a; *see id.* at 92a-98a.

Second, the MSPB affirmed that the employment practice did not meet the basic requirements of 5 C.F.R. § 300.103(a), (b), for a job analysis and a rational relationship between the practice and job performance. App., *infra*, 89a, 98a-103a. The MSPB emphasized, with regard to the lack of a rational relationship requirement, that "[i]t is clear that application of the formula had a drastic effect on the ranking of the applicants on the ALJ register" (citing appendix to MSPB decision, App., *infra*, 124a-126a), and noting that OPM offered no evidence to rebut the finding that, "within the pool of 1,068 applicants, implementation of the 1996 scoring formula allowed 10-point preference eligibles to advance an average of 110.5 places on the ALJ register over non-preference eligible

applicants, while it allowed 5-point preference eligibles to advance an average of 191.8 places," although the "applicants themselves did nothing to account for the disparity." App., *infra*, 102a-103a.

Third, the MSPB affirmed that OPM's use of the 1996 scoring formula was not in accordance with the VPA. App., *infra*, 89a-90a, 104a-110a. The MSPB summarized its ruling by explaining that the long history of veterans' preference in this country (since at least 1888, App., *infra*, 105a) and the VPA "indicate that Congress intended to award a fixed-point advantage to the earned ratings of qualified preference eligible applicants for Federal employment based on a 100-point scale. In this case, OPM awarded 70 rating points to all applicants who met the minimum qualifying experience requirements and completed the four parts of the ALJ examination. However, because these points were awarded on the basis of an invalid employment practice, they were not earned within the meaning of the [VPA]. Thus, when OPM augmented the ratings of preference eligible applicants by 5 or 10 points, it violated the [VPA] because it awarded these points on a scale of 30 earned points rather than the scale of 100 earned points that Congress intended." App., *infra*, 89a-90a.

c. On July 13, 2001, the MSPB denied OPM's request for reconsideration and affirmed its decision. App., *infra*, 28a-63a. The MSPB rejected, *inter alia*, OPM's apparent attempt to limit appealable "employment practices" to exclude "policies and practices that are mandated by Congress." *Id.* at 38a. The MSPB explained that OPM's argument was at odds with longstanding precedent of the Federal Circuit, *id.* at 38a-40a, and "would effectively eliminate the [MSPB's] jurisdiction over OPM employment practices because those practices frequently involve the implementation and administration of policies that have,

or ought to have, their bases in law," *id.* at 38a. The MSPB concluded that, "once the [MSPB] determines it has jurisdiction over an OPM employment practice, it is required to consider whether OPM acted in accordance with law." *Id.* at 40a (*citing* 5 U.S.C. § 7701(c)(2)(C), and *Hamilton v. USPS*, 58 M.S.P.R. 486, 488 (1993)). The MSPB also rejected OPM's argument that it should have deferred, under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to OPM's interpretation of "earned rating" as used in the VPA because, in MSPB's view, that interpretation was contrary to the clear meaning of the statute, App., *infra*, 48a, and because OPM's prior scoring formula was promulgated through notice-and-comment rulemaking, but its 1996 change to that formula was not, *id.* at 51a-52a.

3. The United States Court of Appeals for the Federal Circuit reversed in relevant part. App., *infra*, 1a-24a. First, it affirmed the MSPB's ruling that OPM's 1996 scoring formula for ALJ examinations "is clearly an 'employment practice' as that term is used in 5 C.F.R. Part 300," and that the MSPB had jurisdiction under 5 C.F.R. § 300.104 to review whether it "violated one of the 'basic requirements' for employment practices set forth in 5 C.F.R. § 300.103." App., *infra*, 9a. On the merits of that regulatory violation, the court held that OPM lawfully granted itself a broad variation from those regulations with respect to its implementation of OPM's new 1996 scoring formula for ALJ candidates. *Id.* at 2a, 16a-24a.

With regard to whether OPM's 1996 scoring formula is contrary to the VPA, the court ruled that the MSPB "lacked jurisdiction" to review that issue. App., *infra*, 2a. The court held that the MSPB erred when it concluded that, "'once the [MSPB] determines it has jurisdiction over an OPM employment practice, it is required to consider whether OPM acted in accordance with law [under] 5

U.S.C. § 7701(c)(2)(C).'" *Id.* at 11a-12a. The court stated that Section 7701(c)(2)(C) gives the MSPB "authority to consider whether any agency decision is not in accordance with law, but only with respect to agency decisions that are within the Board's jurisdiction." App., *infra*, 12a. The court held that, "[i]n challenges to employment practices, the relevant OPM regulation, 5 C.F.R. § 300.104(a), does not give the [MSPB] jurisdiction over any and all legal challenges to employment practices; it grants jurisdiction to the Board only with respect to challenges based on the three grounds set forth in 5 C.F.R. § 300.103." App., *infra*, 12a; *see also* note 1, *supra* (setting forth the requirements of Section 300.103). The court characterized its prior decision in *Lackhouse v. MSPB*, 773 F.2d 313 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1049 (1986), as not "to the contrary" because the case involved a different question of MSPB authority and the VPA. App., *infra*, 13a n.1.[3] The court of appeals therefore left in place OPM's 1996 scoring formula which the MSPB had found violated the VPA without determining, itself, whether that was so.

4. Petitioners and the MSPB both filed petitions for rehearing *en banc*. *See* App., *infra*, 146a-164a (reprinting MSPB's petition for rehearing *en banc*). The court of appeals denied the petitions. App., *infra*, 130a-133a.

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[3] This citation to *Lackhouse* differs from the one set forth in the court of appeals' opinion, reprinted verbatim in the appendix, because the opinion provides the wrong page for the case. Similarly, the correct citations for two other cases that were miscited or misspelled at App., *infra*, 12a, are *Goines v. MSPB*, 258 F.3d 1289 (Fed. Cir. 2001), and *Maddox v. MSPB*, 759 F.2d 9 (Fed. Cir. 1985).

REASONS FOR GRANTING THE PETITION

The Federal Circuit erroneously restricted the authority of the Merit Systems Protection Board (MSPB) to review, under the standard of review required by Congress, a properly appealed employment practice. Congress expressly provided that a federal agency decision "may not be sustained" by the MSPB on appeal if the decision "was not in accordance with law." 5 U.S.C. § 7701(c)(2)(C). The court of appeals held, however, that the MSPB must sustain an agency employment practice that is contrary to federal law, except in the very narrow circumstances where the practice is contrary to one of "the three grounds set forth in 5 C.F.R. § 300.103." App., *infra*, 12a. As the MSPB has put it, the Federal Circuit's ruling limits the MSPB's "review of statutes in employment cases to only those statutes that are tied to the jurisdictional element of an employment practice case (i.e., the basic requirements of 5 C.F.R. § 300.103), [which] is contrary to the language and purpose of Section 7701(c)(2)(C)." App., *infra*, 155a. If left unreviewed, the Federal Circuit's decision will prevent the MSPB from exercising the full range of statutory review mandated by Congress under 5 U.S.C. § 7701(c). Nothing would prevent the Office of Personnel Management (OPM), in that event, from implementing yet another scoring formula that could, at the whim of OPM, diminish the value or entirely eliminate the use of veterans' preference points in scoring particular examinations in violation of the VPA. Congress did not intend to grant such unreviewable power to OPM.

A. The Decision Below Unlawfully Restricts The Authority Of The MSPB In A Manner That Conflicts With Decisions Of This Court And The Intent Of Congress

The Federal Circuit's holding that the MSPB may review an employment decision for compliance with some federal laws but not others runs contrary to this Court's decision in *USPS v. Gregory*, 534 U.S. 1 (2001), as well as with the fundamental understandings of adjudication long recognized by this Court. It also is contrary to the intent of Congress which gave no indication that the scope of MSPB appellate authority was meant to diverge from those longstanding principles of adjudication.

1. In *Gregory*, the Court held that the MSPB, in reviewing the United States Postal Service's termination of a federal employee, could independently review the validity of certain prior minor disciplinary actions taken by the agency against that employee that were the justification for the termination. 534 U.S. at 9. The Court so held even though the minor disciplinary actions were not, themselves, independently appealable to the MSPB. *Ibid.* The Court explained that, because the MSPB clearly had the authority "to review [the employee's] termination," and "[b]ecause this termination was based on a series of disciplinary actions, some of which are minor, the Board's authority to review the termination must also include the authority to review each of the prior disciplinary actions to establish the reasonableness of the penalty as a whole." *Id.* at 10.

Like the minor disciplinary actions underlying the adverse agency employment decision in *Gregory*, the OPM's interpretation of the Veterans' Preference Act (VPA), 5 U.S.C. § 3309, underlies the OPM employment decision appealed to the MSPB by petitioners in this case.

The record makes it abundantly clear that OPM had adopted the employment practice challenged by petitioners because OPM erroneously believed that it was required to do so by the VPA. App., *infra*, 43a-48a. Thus, the awarding of preference points under the VPA is inextricably intertwined with OPM's adoption of the challenged scoring formula, a question plainly within the scope of the MSPB's jurisdiction, just as the minor disciplinary matters in *Gregory* were intertwined with the decision to fire the employee and thus within the scope of MSPB's jurisdiction. Because the MSPB had the authority to review OPM's employment practice and OPM defended that practice by reliance on the VPA, the MSPB's authority to review the employment practice "must also include" (*Gregory*, 534 U.S. at 10) the authority to review the interpretation of the VPA in order to determine the validity of the employment practice.

2. a. The holding of *Gregory* that the MSPB is authorized to review the validity of agency actions that underlie a decision that is properly appealable to the MSPB, even where the underlying actions are not independently appealable, is rooted in longstanding rules concerning the authority of an adjudicator to properly resolve the entire case before it. For example, it is well-accepted that a court of limited jurisdiction has authority to adjudicate the merits of affirmative defenses pressed by a defendant, even where the court would not have authority over the defenses as an original matter. The issue is clearly subsumed in this Court's longstanding rule that federal district courts, by definition courts of limited jurisdiction, have the power to resolve counterclaims raised by defendants that do not fall within the courts' original jurisdiction. *See Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 468-469 & n.1 (1974); *see also Kirby v. American Soda Fountain Co.*, 194 U.S. 141, 145-146 (1904) (district court has jurisdiction over counterclaim even

after dismissal of original claim that had been the basis for jurisdiction); *Jackson v. Irving Trust Co.*, 311 U.S. 494, 502 (1941) (noting that district court is "competent" to resolve affirmative defenses that also challenge the court's jurisdiction).

The Court applies the same rule to review by administrative agencies. In *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986), the Court upheld the authority of the Commodity Futures Trading Commission (CFTC) to adjudicate state common law counterclaims once a complaint seeking reparations for a violation of the federal Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, has been submitted to it for adjudication. The Court rejected the argument that the statutory references to counterclaims limited the CFTC's authority to adjudication of counterclaims only under the federal statute and regulations, and excluded from the CFTC's jurisdiction other counterclaims, such as those under state common law. 478 U.S. at 841-842.

First, the *Schor* Court noted that the language and history of the statute did not expressly limit the CFTC's authority in that manner. 478 U.S. at 842. Second, the Court found that adjudication of state common law counterclaims by the agency was "necessary, if not critical, to accomplish the purpose behind the reparations program." *Id.* at 843. The Court emphasized that, absent the authority to address those state common law counterclaims, "the entire dispute may not be resolved in the administrative forum" and may end up in court as well, contrary to Congress's intent. *Id.* at 843-844. Finally, the Court gave "considerable weight" under *Chevron* to the CFTC's consistent and long-held "interpretation of the statute it is entrusted to administer," even though the issue involved the scope of the agency's own authority, *id.* at 844-845, and

even though that particular interpretation raised serious constitutional concerns, *id.* at 847.

b. The Federal Circuit's restriction of the MSPB's authority in this case runs contrary to those fundamental notions. As in *Schor*, the plain language of the statute vests the MSPB with authority over the entire "case" on appeal. 5 U.S.C. § 7701(b)(1). The MSPB has jurisdiction when an employee or applicant appeals to the MSPB "from any action which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. § 7701(a). OPM's regulation provides that "[a] candidate who believes that an employment practice which was applied to him or her by [OPM] violates a basic requirement in § 300.103 is entitled to appeal to the Merit Systems Protection Board under the provisions of its regulations." 5 C.F.R. § 300.104(a). Petitioners were entitled to appeal to the MSPB under that provision because they demonstrated that an "employment practice" existed (OPM's new 1996 scoring formula for evaluating ALJ candidates), that OPM applied it to them, and that petitioners believed it violated the requirements of the OPM regulation, § 300.103(a), (b), (c). *See Vesser v. OPM*, 29 F.3d 600, 603 (Fed. Cir. 1994); App., *infra*, 7a-11a (Federal Circuit correctly finding that all those elements were established in this case).

There is nothing in the statute that suggests any intent by Congress to limit the authority of the MSPB as the court of appeals did. To the contrary, Congress specifically prescribed the burdens of proof and standards of review that the MSPB is required to apply on review of appealable agency actions. Under Section 7701(c)(1)(B), the MSPB must generally sustain an agency decision if the decision "is supported by a preponderance of the evidence." Congress further specified, however, that an agency's decision "may not be sustained" if the employee or applicant shows that the agency decision was (A) based on

harmful procedural error, (B) was based on "any prohibited personnel practice described in [5 U.S.C. § 2302(b)]", or (C) "not in accordance with law." 5 U.S.C. § 7701(c)(2). Such review is critical to furthering the purposes of the statute that federal employees not be subject to unlawful personnel actions.

Yet, the court of appeals' decision holds that a regulation promulgated by OPM somehow trumps that clear statutory mandate. The Federal Circuit viewed 5 C.F.R. § 300.104(a) as limiting the MSPB's authority to review only whether the challenged employment practice violated the requirements of another regulation, 5 C.F.R. § 300.103. App., *infra*, 11a-15a. But OPM's regulation authorizing appeal to the MSPB of any employment practice that an employee believes violates the basic requirements of Section 300.103 is merely the vehicle by which MSPB authority to review the agency employment decision attaches. It does not, and cannot, restrict the statutorily defined scope of MSPB's authority on appeal. That is a matter that Congress addressed. Once the MSPB has authority to review an agency decision, the MSPB is required to apply the standards of review and burdens of proof mandated by Congress at 5 U.S.C. § 7701(c)(1), (2). *Cf. Gregory*, 534 U.S. at 6-7 (Congress intended to "allow[ ] the MSPB wide latitude in fulfilling its obligation to review agency actions").

Congress further evidenced its intent that the MSPB exercise broad authority to refuse to sustain federal agency employment decisions that were not in accordance with federal statutes in the subsequent subsection of the statute – Section 7701(d). Congress expressly provided that, "[i]n any case in which the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under [Section 7701]," the OPM

Director may intervene as of right or otherwise participate "in that proceeding before the Board" if the Director believes that an erroneous decision would substantially impact any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. § 7701(d)(1)(A), (B). In addition, Congress provided that the Board "shall promptly notify" the OPM Director "whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section." 5 U.S.C. § 7701(d)(2). By specifically referring to the MSPB's "interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management" and requiring that, when such an interpretation or application is at issue, the Director of OPM be notified and allowed to participate, Congress could not have meant to limit the MSPB's review to OPM's narrow regulation set forth in 5 C.F.R. § 300.103. Certainly, that unambiguous language means that Congress did not intend that proceedings before the MSPB involving the MSPB's determination whether an agency decision is "not in accordance with law" be limited to review for regulatory error under 5 C.F.R. § 300.103.

Furthermore, and as in *Schor* again, restriction of the MSPB's authority to decline to sustain federal agency employment decisions that are not in accordance with law would defeat the goal of the statutory scheme to have such federal agency employment matters resolved through the MSPB. In *United States v. Fausto*, 484 U.S. 439 (1988), the Court recognized that the framework of the statute reflected Congress's clear intent to assure "the primacy of the MSPB for administrative resolution of disputes over adverse personnel action," with only Federal Circuit review, so as to "enable[ ] the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoid[ing]

an 'unnecessary layer of judicial review' in lower federal courts, and 'encourag[ing] more consistent judicial decisions. . . .'" *Id.* at 449 (quoting in part S. Rep. No. 95-969, at 52 (1978); *Lindahl v. OPM*, 470 U.S. 768, 797-798 (1985)). The Federal Circuit's holding defeats that intent and deprives petitioner of the unitary administrative review intended by Congress.[4]

To the extent there is any ambiguity in the statutory language governing the scope of the MSPB's appellate authority, 5 U.S.C. § 7701, the court of appeals erred in substituting its own judgment for that of the MSPB. Under *Gregory* and *Schor*, the court was obliged to defer to the MSPB's consistent and longstanding interpretation and application of its standard of review statute under the

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[4] Because of Congress's intent to channel all challenges to federal agency employment decisions through the MSPB, it is not clear that any alternative forum exists in which petitioners could challenge OPM's action. Although OPM's action would normally be subject to suit under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, Section 703 of the APA bars review under the APA when Congress has provided a "special statutory review proceeding." 5 U.S.C. § 703. Section 7701 of Title 5 gives the MSPB jurisdiction to review any matter made appealable to it by statute or regulation. Because the Federal Circuit determined that OPM's employment decision at issue was appealable to the MSPB under Section 7701, Section 7701 may constitute a special statutory proceeding within the meaning of Section 703 of the APA and eliminate the availability of APA review in district court. In *Fausto*, for example, this Court held that certain federal employees who could not seek review of employment decisions before the MSPB were precluded from seeking review under other, generally applicable federal causes of action because of Congress's intent, reflected in the structure of the statute, that the MSPB and the Federal Circuit were intended to be the sole fora for any such complaints. *See Fausto*, 484 U.S. at 450; *cf. Tiltti v. Weise*, 155 F.3d 596, 601 (2d Cir. 1998) (collecting cases holding that *Fausto*'s rationale extends to employee suits under Administrative Procedure Act even when MSPB can provide no remedy).

principles of *Chevron* and its progeny. *See Schor,* 478 U.S. at 844-845 (deferring to agency's determination regarding scope of its adjudicatory authority). The MSPB documented in its petition for rehearing *en banc* in this very case that, for the past 22 years, it has consistently determined that it is required by Section 7701 to review an appealable employment decision to determine if that decision "was not in accordance with law." *See* App., *infra*, 159a. As in *Gregory*, the Federal Circuit's failure to find "that the Board has applied [its] policy inconsistently" is evidence that there was "certainly nothing arbitrary about the Board's decision." 534 U.S. at 8 (giving weight to fact that "the Board has taken this same approach for 19 years").

Finally, the MSPB's interpretation of the statutory language is compelling here because the Court has applied the same interpretation to the identical language in the Administrative Procedure Act. *See FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 123 S. Ct. 832, 838 (2003) ("The Administrative Procedure Act requires federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. § 706(2)(A) – which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering." (emphasis in original)).

B. Review By This Court Is Warranted At This Juncture Because MSPB's Request For *En Banc* Review Was Denied And No Other Circuit Has Jurisdiction To Decide This Important Issue Affecting Review Of Federal Employment Decisions

The Federal Circuit has exclusive jurisdiction over appeals from MSPB employment decisions. *See* 5 U.S.C.

§ 7703(b)(1). Thus, there is no basis for the Court to await a division among the circuits on the issue presented here regarding the MSPB's authority – no such division can occur. Moreover, the Federal Circuit's holding in this case is so inconsistent with past practice of the Federal Circuit as well as the prior understandings of the MSPB, that it warrants review as "an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

In response to the decision below, the MSPB – exercising its authority to represent itself independently in the lower federal courts, *see* 5 U.S.C. § 1204(i) – filed a petition for rehearing *en banc* before the Federal Circuit. App., *infra*, 146a-164a. As part of that petition, the MSPB certified that it believed that the court of appeals' holding resolved an issue of "exceptional importance." *Id.* at 150a. The MSPB argued that the Federal Circuit had overstepped its authority by redefining the scope of the MSPB's jurisdiction over OPM decisions. *Id.* at 162a. The MSPB explained that, under the panel's erroneous holding, "once the Board properly exercises its jurisdiction over an OPM employment practice, it cannot review a law that the applicants for employment show is tied to and violated by the employment practice." *Id.* at 155a n.1. The MSPB explained that the Federal Circuit's holding "is contrary to the language and the purpose of § 7701(c)(2)(C)." App., *infra*, 155a. The MSPB also emphasized that the court of appeals' decision was "contrary . . . to the Board's consistent interpretation of" Section 7701(c) that the MSPB could apply its reviewing authority to declare an agency

decision illegal if it violated any applicable law. App., *infra*, 160a; *see also id.* at 162a.[5]

The MSPB emphasized that the decision below, if left in place, "would severely limit the Board's review authority over agency decisions established to be within its jurisdiction." App., *infra*, 158a. It made clear that the holding would now leave federal agencies free to act "unchecked by [the] reviewing bodies charged with sustaining or not sustaining those decisions," contrary to the intent of Congress. *Id.* at 154a.

The MSPB's petition for rehearing *en banc* in this case was unusual. It appears that over the course of the MSPB's 25-year existence, it has filed such petitions only in approximately a half a dozen cases. The failure of the Federal Circuit to take heed of the MSPB's rare call for further consideration indicates that the court of appeals has definitively resolved the matter and there is no cause to await further developments in that court. The Federal Circuit, with its exclusive jurisdiction, is well aware that the views of the MSPB with regard to the issue presented by this case are unusually significant because, as noted above, Congress intended to channel through the MSPB virtually all challenges by federal employees and applicants

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[5] Among the cases cited by the MSPB (App., *infra*, 157a n.4, 159a & n.6) were *Cuellar v. USPS*, 8 M.S.P.R. 624, 629, 632 (1981) (overturning an OPM regulation authorizing 30 day emergency suspensions because the regulation was "not in accordance with law"); *Clark v. USPS*, 52 M.S.P.R. 634, 639-640 (1992) (taking two disciplinary actions on the same grounds was "not in accordance with law"); *Morgan v. USPS*, 82 M.S.P.R. 1, 4 (1999) (agency action taken against an employee because of his military service violated 38 U.S.C. § 4311), *aff'd*, 250 F.3d 754 (Fed. Cir. 2000); *Hamilton v. USPS*, 58 M.S.P.R. 486, 488-489 (1993) (adverse action "not in accordance with law" where decision letter was signed by a deciding official after that official retired).

to employment decisions by federal agencies. *See Fausto*, 484 U.S. at 450. Moreover, Congress granted the MSPB authority not only to engage in formal adjudications, but also authority to issue notice-and-comment rulemakings, *see* 5 U.S.C. §§ 1204(a)(1), (h), 7701(k), and broad authority to remedy violations of laws and regulations, *see* 5 U.S.C. § 1204(a)(2), (e)(2)(A), (f)(4), (m). In short, the MSPB has been charged with primary responsibility for supervising the conduct of OPM and federal agencies with regard to employment matters. *See Fausto*, 484 U.S. at 450; *Gregory*, 534 U.S. at 7. Yet the court of appeals below held that the MSPB does not have the authority to determine whether an employment practice properly appealable to it was made in accordance with a federal law, even when that federal law is invoked by the federal agency to justify the decision. App., *infra*, 12a-14a.

Even OPM recognized, in its response to the petitions for rehearing *en banc*, that the court of appeals' holding in this case conflicted with an earlier Federal Circuit decision – *Lackhouse v. MSPB*, 773 F.3d 313 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1049 (1986) – but argued that, "[t]o the extent *Lackhouse* supports the petitioners' arguments, it is incorrect." Combined Opp. of OPM to Petitions for Reh'g En Banc 8.[6] Yet, in response to this acknowledgment by

[6] The court of appeals attempted to distinguish *Lackhouse* on the ground that the jurisdictional issue it was addressing was not at issue in *Lackhouse*. App., *infra*, 13a n.1. But *Lackhouse* specifically held that MSPB had jurisdiction to decide whether OPM's regulation challenged in that case was invalid because it conflicted with the VPA. "It follows that the MSPB . . . erred in saying that the Board lacked jurisdiction over the question of the validity of the 'rule of three' . . . as applied to veteran preference eligibles. MSPB did have that precise authority." *Lackhouse*, 773 F.2d at 315 (footnote omitted); *id.* at 316 ("the MSPB did have jurisdiction"). Indeed, even OPM acknowledged in its response

(Continued on following page)

OPM that the Federal Circuit's own prior precedent supported a different result than that reached by the panel, the Federal Circuit denied the petition for rehearing *en banc* filed by the MSPB. Thus, there is no basis for awaiting further developments in the Federal Circuit.

If the MSPB cannot review the lawfulness of an employment decision properly under its jurisdiction, OPM can ignore and violate federal law in setting personnel rules with impunity. Congress vested the MSPB in 5 U.S.C. § 7701(c)(2)(C) with such oversight authority to declare an agency decision invalid if it was not in accordance with law. The Federal Circuit improperly limited the MSPB's function in a manner that will require it to sustain unlawful employment decisions in this case and in an array of situations in the future.

C. The Decision Below Will Have Long-Term Adverse Consequences For The Quality Of Federal Administrative Law Judges Who Are Responsible For Safeguarding The Legal Rights Of Others

The Federal Circuit's decision results in an abdication of its responsibility to review the legality of a federal agency's employment decision that was found by the MSPB to be "not in accordance with law." That federal agency employment decision continues to result in the appointment of lesser qualified administrative law judges to adjudicate important federal programs and benefits.

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to the petitions for rehearing *en banc* in this case that, although not the primary issue addressed in *Lackhouse*, *Lackhouse* did consider whether there was a "conflict between the [employment practice] and the VPA." Combined Opp. of OPM to Petitions for Reh'g En Banc 8 n.6.

That is directly contrary to OPM's own regulation that requires that competitive employment practices "[r]esult in selection from among the best qualified candidates." 5 C.F.R. § 300.102(b), *see also* 5 U.S.C. § 2301(b)(1).

The diminished quality of these judges has been noted by other government agencies. In particular, the Social Security Administration (SSA), the federal agency that employs the largest number of ALJs, expressed its concern that the 1996 "process of scoring exams and ranking candidates is not objective, [and] does not ensure a minimum level of competency in the four areas examined." C.A. Supp. App. 56; *see also id.* at 51 and App., *infra*, 80a (discussing letter from former Commissioner of the SSA to the Director of OPM "to express her concern with the application of the 1996 formula and to suggest a meeting between the members of their respective offices 'to review the impact of the new scoring system on the examination process as well as the composition of the referral lists.'"). The continuing impact of this case is thus borne not only by the more than 1200 nonpreference eligible ALJ candidates on the ALJ register, but also on members of the American public, who have important benefits and entitlements determined by ALJs less capable than intended by Congress.

The reason that the OPM's 1996 scoring formula leads to the selection of lesser qualified candidates than Congress intended is because that formula requires the award of 5 or 10 preference points to eligible veterans and relatives of veterans as set forth by Congress, without regard to the fact that the agency is no longer using a 100-point scale for earned points as intended by Congress in the VPA. As the MSPB explained, the statutory text and history (since 1888) demonstrate that Congress intended veteran preference points to be awarded on an earned scale of 100 points. App., *infra*, 104a-108a. But, under its

new formula, OPM awarded 70 points to every applicant who took the examination, regardless of how they performed on the examination. OPM accordingly compressed the earned scores on the competitive ALJ examination to a scale of 0 to 30. Thus, as the MSPB found, OPM thereby dramatically increased the impact of the awards of 5 and 10 preference points far beyond the intent of Congress in the VPA. This result is particularly troubling when, as is the case here, the American public relies on the appointment of qualified ALJs to hear and adjudicate their rights, benefits, and entitlements under federal programs.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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October 22, 2003

MURRAY M. MEEKER, F. WILLIAM ROGGEVEEN, JAY E. LEVINE, AND WILLIAM S. COLWELL, Petitioners, and KAY COLES JAMES, Director, Office of Personnel Management, Petitioner, v. MERIT SYSTEMS PROTECTION BOARD, Respondent, and ANN S. AZDELL and DONALD B. FISHMAN, Intervenors,

01-3057, 02-3042

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

February 20, 2003, Decided

COUNSEL: William F. Fox, Jr., Professor of Law, The School of Law, The Catholic University of America, of Washington, DC, argued for petitioners, Murray M. Meeker, et al.

Todd M. Hughes, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for petitioner, Kay Coles James, Director, Office of Personnel Management. With him on the brief were Robert D. McCallum, Jr., Assistant Attorney General; and David M. Cohen, Director. Of counsel on the brief were Mark A. Robbins, General Counsel; Kathie A. Whipple, Deputy General Counsel; Steve E. Abow, Eric S. Gold, Kimya Jones, and Julie Ferguson Queen, Attorneys, Office of General Counsel, Office of Personnel Management, of Washington, DC. Of counsel were Armando O. Bonilla, and Kathryn A. Bleecker, Attorneys, Department of Justice.

Joyce G. Friedman, Attorney, Office of the General Counsel, Merit Systems Protection Board, of Washington, DC, argued for respondent. With her on the brief were Lynn A. Jennings, General Counsel; and Martha B. Schneider, Deputy General Counsel.

William L. Bransford, Shaw, Bransford, Veilleux & Roth, of Washington, DC, argued for intervenors. With him on the brief was Debra L. Roth.

Barton F. Stichman, National Veterans Legal Services Program, of Washington, DC, for amicus curiae The American Legion. With him on the brief was Louis J. George.

Karin L. Kizer, Covington & Burling, of Washington, DC, for amici curiae Disabled American Veterans, et al. With him on the brief were Michael C. Boteler and Harris Weinstein.

JUDGES: Before SCHALL, BRYSON, and LINN, Circuit Judges.

OPINION BY: BRYSON

OPINION: BRYSON, Circuit Judge.

Petitioners Meeker et al. and the Office of Personnel Management ("OPM") appeal a decision by the Merit Systems Protection Board in which the Board concluded that the scoring formula OPM used in 1996 to evaluate candidates for the position of administrative law judge ("ALJ") violated OPM's regulations and the Veterans' Preference Act. We hold that the Board had jurisdiction to review OPM's scoring formula pursuant to the Board's authority to review "employment practices," but that it lacked jurisdiction to review the challenge to the scoring formula based on the Veterans' Preference Act. On the merits, we conclude that the 1996 scoring formula was lawfully adopted pursuant to the OPM Director's authority to grant a variation from strict adherence to the requirements of OPM's regulations and that the scoring formula therefore did not violate those regulations. Accordingly, we

reverse the Board's decision in part and vacate its remedial order.

I

In 1993, in accordance with its statutory authority to conduct competitive examinations for ALJs, OPM promulgated the examination scoring formula found at 5 C.F.R. § 930.203. Under that formula, applicants were required to meet minimum qualifying experience requirements. Those who met the experience requirements would be assigned a score on the "supplemental qualifications statement," a statement detailing relevant legal experiences. The applicants would then participate in three additional examination procedures: a written demonstration, a panel interview, and a personal reference inquiry. Those applicants who completed the supplemental qualifications statement and participated in the three additional examination procedures would be assigned a weighted score for each of those four parts of the examination. Based on the results of a 1990 study, OPM weighed the four parts of the examination as follows: (1) the supplemental qualification statement – 50 percent; (2) the written demonstration – 20 percent; (3) the personal interview – 20 percent; and (4) the personal reference inquiry – 10 percent.

Under the 1993 scoring formula, the total of the weighted scores ranged from 0 to 100, with 70 required to pass. In the first group of candidates examined under the 1993 scoring formula, OPM added 10.9 points to each candidate's score in order to bring the lowest weighted score up to a passing grade of 70. Veteran preference points were then added, as appropriate, with ten points

being added to the scores of disabled veterans and five points being added to the scores of nondisabled veterans, as provided by the Veterans' Preference Act, 5 U.S.C. § 3309. OPM then compiled a register of all applicants who passed the examination. When agencies requested lists of certified ALJ candidates for positions in various geographic areas, OPM ranked all applicants who were eligible and available for the positions in question. The ranking was based on the assigned final ratings, augmented by veteran preference points if applicable.

In 1996, following an investigation by OPM's Inspector General into fraudulent scoring of the ALJ examinations, portions of the ALJ examination were rescored. After the rescoring, the failure rate on the examination rose dramatically, such that approximately 80 percent of the applicants failed to attain the minimum score of 70 required to qualify for ALJ certification under the 1993 formula.

Because of the extremely high failure rate, OPM decided to modify the 1993 scoring formula, rather than simply adding points to each applicant's score, as had been done before. Under the new formula, applicants who satisfied a minimum requirement of seven years' experience as an attorney involved in administrative hearings or litigation and completed the remaining parts of the examination were assigned a base score of 70 points. Applicants then received scores in accordance with the 1993 formula for the four graded portions of the examination. Under the 1996 formula, however, each applicant's weighted score for those four parts of the examination was multiplied by 0.3, so that the scores on the four graded portions of the examination ranged from 0 to 30 points, rather than from 0 to 100 points as had been the case

under the 1993 formula. After the four-part weighted score was added to the 70-point base, any applicable veteran preference points were added to the applicant's total to produce the final score.

Like the 1993 formula, the 1996 formula required a score of 70 to pass. Unlike the 1993 formula, however, the 1996 formula guaranteed that any applicant who met the work experience prerequisite and completed the four graded portions of the examination would receive a passing score and be placed on the register, regardless of the applicant's score on the four graded portions. Therefore, any preference eligible applicant would receive veteran preference points as long as the applicant met the work experience prerequisite and completed the graded parts of the examination.

Because the 1996 formula differed from the 1993 formula described in 5 C.F.R. § 930.203, the Director of OPM approved a variation from the regulation using the procedures outlined in 5 C.F.R. § 5.1. Under that regulation, OPM's Director is authorized to "grant a variation from the strict letter" of any OPM regulation whenever there are "practical difficulties and unnecessary hardships" in complying with the regulation, as long as the variation is "within the spirit of the [OPM] regulations, and the efficiency of the Government and the integrity of the competitive service are protected and promoted." 5 C.F.R. § 5.1.

In 1997, nonveteran applicants for the ALJ positions filed a class action appeal to the Merit Systems Protection Board claiming that the 1996 scoring formula was unlawful. Those applicants, referred to as the Azdell class, argued *inter alia* that the 1996 formula violated 5 C.F.R.

§ 300.103, which requires that any OPM employment practice, such as an examination procedure for qualifying applicants for a civil service position, must be professionally prepared, rationally related to the duties of the position, and nondiscriminatory. They also argued that the 1996 scoring formula violated the Veterans' Preference Act by giving veterans a greater preference than Congress intended for them to have.

The Board assigned the appeal to the Board's Chief Administrative Law Judge. Following an evidentiary hearing, the Chief Administrative Law Judge issued a decision on the merits of the claim, in which he found that the 1996 scoring formula for the ALJ position violated the OPM regulations and the Veterans' Preference Act. He then issued a separate decision on remedy, in which he ordered certain applicants to be given priority status in selection for open ALJ positions.

OPM sought review of the Chief Administrative Law Judge's decision by the full Board. Four veterans who had applied for ALJ positions, petitioners Meeker, Roggeveen, Levine, and Colwell ("the Meeker petitioners"), intervened and joined OPM's request for review. The full Board granted review and sustained the Chief Administrative Law Judge's ruling in principal part.

The Board held that OPM's 1996 scoring formula violated two of the three subsections of 5 C.F.R. § 300.103. In particular, the Board held that the 1996 scoring formula violated section 300.103(a) because it was not based on a job analysis of the ALJ position. The Board held that the 1996 scoring formula also violated section 300.103(b) because it was not professionally developed and that OPM

therefore failed to show that there was a rational relationship between the scoring formula and performance in the ALJ position. The Board also held that the 1996 scoring formula violated the Veterans' Preference Act because, in the Board's view, it increased the effective weight of veteran preference points beyond that intended by Congress. The Board disagreed with the Chief Administrative Law Judge's analysis in one respect: it rejected his conclusion that the 1996 scoring formula violated section 300.103(c), the nondiscrimination clause of OPM's regulations regarding employment practices. With respect to the issue of remedy, the Board amended the Chief Administrative Law Judge's order in several minor respects, but otherwise upheld the order requiring OPM to give priority consideration to candidates who would have been eligible for selection but for the improper scoring formula.

II

A

Both OPM and the Meeker petitioners argue that the Board lacked jurisdiction to review OPM's 1996 scoring formula for ALJ positions. The Board invoked its jurisdiction under 5 C.F.R. § 300.104(a). That regulation authorizes a candidate for appointment to a federal civil service position to appeal to the Merit Systems Protection Board if the candidate believes that an employment practice applied to him by OPM violates a basic requirement in 5 C.F.R. § 300.103. An employment practice is any practice that affects "the recruitment, measurement, ranking and selection of individuals for initial appointment and competitive promotion in the competitive service." 5 C.F.R. § 300.101.

Section 300.103 contains three requirements with respect to any employment practice. First, an employment practice must be based on a job analysis identifying the duties of the position, the knowledge, skills, and abilities necessary to perform those duties, and the factors that are important in evaluating candidates for the position. 5 C.F.R. § 300.103(a). Second, there must be a rational relationship between performance in the position and the employment practice used to select for that position; that relationship must be demonstrated by showing that the employment practice was professionally developed. *Id.* § 300.103(b). Third, an employment practice may not discriminate on the basis of race, color, religion, sex, age, national origin, partisan political affiliation, or any other nonmerit factor. *Id.* § 300.103(c).

OPM and the Meeker petitioners contend that the underlying dispute in this case is whether the 1996 formula unduly advantages veterans by increasing the beneficial effect of the addition of veteran preference points on a candidate's final standing. The Meeker petitioners argue that the granting of veteran preference points is mandated by statute and as such is not an employment practice over which the Board has jurisdiction under 5 C.F.R. § 300.104(a).

We reject the Meeker petitioners' argument. The Veterans' Preference Act makes clear that veteran preference points, as applicable, are added to the score of a candidate who "receives a passing grade in an examination for entrance into the competitive service." 5 U.S.C. § 3309. The scoring of the examination and the award of veteran preference points are therefore separate steps in the process of calculating the final scores on which eligibility will be determined. The challenge to the 1996 scoring

formula based on the asserted violation of 5 C.F.R. § 300.103(a) and (b) is therefore legally distinct from the challenge based on the Veterans' Preference Act.

OPM makes a somewhat different argument. OPM asserts that the only reason the Azdell class is challenging the 1996 scoring formula is because veteran preference points have greater weight under that formula than under the 1993 scoring formula. The effect of veteran preference points on the selection process, OPM argues, is not within the Board's authority to review. OPM further contends that relief to a class defined by the class members' nonveteran status is improper where the relative ranking of veterans and nonveterans would remain unchanged but for the addition of veteran preference points.

We disagree with OPM's submission. Section 300.104(a) gives the Board jurisdiction when two conditions are met: first, the appeal must concern an "employment practice," and second, the employment practice must be alleged to have violated one of the "basic requirements" for employment practices set forth in 5 C.F.R. § 300.103. The 1996 scoring formula for ALJ examinations is clearly an "employment practice" as that term is used in 5 C.F.R. Part 300. Its use resulted in a new qualification standard for ALJs, and thus clearly affected the "measurement, ranking and selection of individuals for initial appointment" to the ALJ positions. *See* 5 C.F.R. § 300.101; *Dowd v. United States,* 713 F.2d 720, 723 (Fed. Cir. 1983) (the term "employment practices" has a broad and inclusive meaning). Indeed, this court has recently held that suspending the use of the precise scoring formula at issue in this case is an "employment practice" within the meaning of 5 C.F.R. Part 300. *Bush v. Office of Pers. Mgmt.,* 315 F.3d 1358 (Fed. Cir. 2003). The Azdell class's challenge to

the scoring formula also entailed, at least in part, an allegation that the 1996 scoring formula failed to meet the "basic requirements" for employment practices set forth in 5 C.F.R. § 300.103.

OPM argues that the Azdell class invoked the Board's jurisdiction under 5 C.F.R. § 300.104(a) "to challenge OPM's implementation of the [Veterans' Preference Act]" and that because OPM's implementation of the Veterans' Preference Act is not an "employment practice," the Board lacked jurisdiction. The Azdell class, however, challenged OPM's action not only for allegedly violating the Veterans' Preference Act, but also for allegedly violating the requirements of 5 C.F.R. § 300.103, and the Board clearly had jurisdiction to address the latter claim.

The fact that this appeal was prosecuted because certain nonveteran ALJ applicants were unhappy about the fact that the 1996 scoring formula increased the advantage of veterans over nonveterans in the competition for ALJ positions is irrelevant to the issue of jurisdiction. It is true, as OPM and the Meeker petitioners point out, that the Board lacks jurisdiction to review the five and ten extra points to which veterans and disabled veterans are statutorily entitled in the scoring of civil service examinations. The legal challenge based on the requirements of section 300.103, however, was not directed at the granting of preference points. While the motivation for taking the appeal may have been the greater impact of the veteran preference points under the 1996 scoring formula, the motivation for prosecuting an appeal does not determine whether a particular tribunal has jurisdiction to consider it.

OPM's argument that the Veterans' Preference Act precludes the Board from reviewing the 1996 scoring formula would have force only if the Veterans' Preference Act required OPM to adopt the 1996 scoring formula or if any scoring formula having an effect on veterans would be immunized from challenge under the OPM regulations. But OPM does not make either of those arguments in this court, nor is there any legal basis for either proposition. OPM has two separate legal obligations that are relevant here: It must generate examinations that comply with the requirements of 5 C.F.R. § 300.103, and it must then adjust the results of those examinations by adding veterans preference points, as applicable. The fact that the second step is mandated by Congress does not mean that the first step is immune from administrative review. We therefore hold that the Board properly exercised jurisdiction under 5 C.F.R. § 300.104(a) to address the Azdell class's challenge to the 1996 scoring formula.

B

We take a different view of the question of the Board's jurisdiction to address whether the 1996 scoring formula was inconsistent with the Veterans' Preference Act. The Azdell class argued that the 1996 scoring formula violated the Veterans' Preference Act because it compressed the range of scores and thereby increased the impact of veteran preference points on the candidates' final rankings. That effect, according to the Azdell class, resulted in granting veterans more favorable treatment in the scoring process than Congress meant for them to have. The Board concluded that it had jurisdiction to address that issue on the ground that, "once the Board determines it has jurisdiction over an OPM employment practice, it is required to

consider whether OPM acted in accordance with law [under] 5 U.S.C. § 7701(c)(2)(C)."

That jurisdictional theory is incorrect. The statute that the Board invoked, 5 U.S.C. § 7701(c)(2)(C), gives the Board authority to consider whether any agency decision is not in accordance with law, but only with respect to agency decisions that are within the Board's jurisdiction. The Board does not have general jurisdiction to entertain any statutory challenge to an employment practice. Rather, the Board's jurisdiction is strictly confined to those matters over which it has been given jurisdiction by statute, rule, or regulation. *See Goines v. Merit Sys. Prot. Bd.*, 285 F.3d 1289, 1292 (Fed. Cir. 2001); *Maddox v. Merit Sys. Prot. Bd.*, 757 F.2d 9, 10 (Fed. Cir. 1985); 5 U.S.C. § 7701(a); 5 C.F.R. § 1201.3. In challenges to employment practices, the relevant OPM regulation, 5 C.F.R. § 300.104(a), does not give the Board jurisdiction over any and all legal challenges to employment practices; it grants jurisdiction to the Board only with respect to challenges based on the three grounds set forth in 5 C.F.R. § 300.103. *See Vesser v. Office of Pers. Mgmt.*, 29 F.3d 600, 603 (Fed. Cir. 1994) (an "employment practice" gives rise to an appeal to the Board only if the employment practice "has been applied . . . in a manner that violates a 'basic requirement' as defined in 5 C.F.R. § 300.103"); *Dowd*, 713 F.2d at 722 ("to be appealable an action [based on an employment practice] must . . . meet the requirements of section 300.103"). It is therefore incorrect to say, as the Board did, that once the Board has properly exercised jurisdiction over an OPM employment practice, it has

jurisdiction to consider whether that employment practice violates any law whatsoever.[1]

The Chief Administrative Law Judge used a different route to reach the question whether OPM's 1996 scoring formula violated the Veterans' Preference Act. He held that the 1996 scoring formula violated 5 C.F.R. § 300.103(c), one of the three grounds on which the Board has jurisdiction to review OPM employment practices. That provision requires that OPM employment practices not discriminate on various specified grounds or on any other "nonmerit factor." The Chief Administrative Law Judge concluded that the 1996 scoring formula discriminated on the basis of a nonmerit factor because the scoring formula has the effect of giving veterans a greater advantage than Congress intended under the Veterans' Preference Act. The Board, however, rejected the Chief Administrative Law Judge's reliance on section 300.103(c), holding that in light of Congress's decision to except veterans from the strict application of merit selection principles and to reward them for service to the country,

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[1] This court's decision in *Lackhouse v. Merit Systems Protection Board*, 773 F.2d 363 (Fed. Cir. 1985), is not to the contrary. In that case, the court rejected the argument that the Board lacked jurisdiction to address a claim that a particular OPM regulation was inconsistent with the Veterans' Preference Act. The question presented to the court was which entity was applying the relevant employment practice, OPM or the IRS, the employing agency. The court did not address the scope of the Board's jurisdiction over claims that an OPM regulation is incompatible with the Veterans' Preference Act. The Lackhouse case therefore has no precedential force with respect to that jurisdictional issue. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984); *Fla. Power & Light Co. v. United States*, 307 F.3d 1364, 1371 (Fed. Cir. 2002).

"an individual's status as a preference eligible applicant is not a 'nonmerit factor' within the context of 5 C.F.R. § 300.103(c)." No party to the proceedings before us has challenged that aspect of the Board's decision. We therefore decline to consider whether the Board was correct in holding that 5 C.F.R. § 300.103(c) has no application to benefits accorded to preference eligibles. By extension, we decline to decide whether the Board, in an appropriate case, could address a claim that any preference accorded to veterans would constitute discrimination on a nonmerit basis (in violation of 5 C.F.R. § 300.103(c)) unless the preference strictly complied with the Veterans' Preference Act.[2]

To summarize our jurisdictional analysis, we hold that the Board properly asserted jurisdiction under 5 C.F.R. § 300.104(a) to address the appellants' challenge to the 1996 scoring formula on the ground that it violated 5 C.F.R. § 300.103(a) and (b). We further hold, however, that the Board erred when it asserted jurisdiction to address the claim that the 1996 scoring formula violated the Veterans' Preference Act, because the Board does not have general, free-standing jurisdiction to address claims that an OPM employment practice is not in accordance with law.

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[2] We likewise decline to reach the question whether the Board could have addressed the validity of the 1996 scoring formula under the Veterans' Preference Act based on the Board's authority under 5 U.S.C. § 1204(f) to review rules or regulations promulgated by the Director of OPM. The parties did not press that theory of jurisdiction on the Board, the Board did not invoke that theory as a basis for its action, and no party has urged that theory on us.

III

On the merits of the claims arising under 5 C.F.R. § 300.103, the Board found that the 1996 scoring formula violated the requirements of section 300.103 in two ways: (1) it was not based on a job analysis that identified the knowledge, skills, and abilities required to perform the duties and responsibilities of the ALJ position, as required by section 300.103(a), and (2) it was not shown to have been professionally developed, and thus was not demonstrated to be rationally related to performance in the ALJ position, as required by section 300.103(b).

OPM concedes that no job analysis was performed as part of the process of constructing the 1996 scoring formula, but it contends that the new formula was professionally developed by OPM staff and that the factors taken into account under the 1996 scoring formula are rationally related to the duties of the ALJ position. In any case, OPM argues, any deficiencies in the process of constructing the 1996 scoring formula were obviated by the fact that the Director issued a variation permitting the 1996 scoring formula to go into effect without strict compliance with the requirements of the OPM regulations, including 5 C.F.R. § 300.103.

A

The Chief Administrative Law Judge concluded that the Director's variation from the 1993 formula was invalid because it was not "within the spirit of § 930.203(e), which requires a 100-point scale." The Chief Administrative Law Judge further found that because the change from a 100-point scale to a 30-point scale "significantly increases the advantage [accorded to preference eligibles] beyond that

intended by Congress, . . . the integrity of the competitive service was not protected."

The Board did not reach the question whether the variation was invalid because, in the Board's view, even if the variation was valid it had only a limited effect. As the Board interpreted the variation, it had the effect of waiving strict compliance with 5 C.F.R. § 930.203(e), which sets forth the 1993 scoring formula for the ALJ examination. It did not, however, waive the requirements for valid employment practices set forth in 5 C.F.R. § 300.103.

We disagree with both the Chief Administrative Law Judge and the Board regarding the validity and scope of the variation. Contrary to the Chief Administrative Law Judge, we conclude that the variation was valid. Contrary to the Board, we hold that the variation was broad enough to waive strict compliance with the requirements of 5 C.F.R. Part 300.

B

The authority of the Director of OPM to issue a variation from strict compliance with the requirements of the OPM regulations is codified in 5 C.F.R. § 5.1, which was promulgated by the President through an executive order. Exec. Order No. 12,107, 44 Fed. Reg. 1055 (Dec. 28, 1978). Section 5.1 provides that the Director of OPM may grant a variation from the requirements of particular OPM regulations whenever the Director determines that complying with the strict letter of such a regulation would result in practical difficulties and unnecessary hardships. In order to authorize a variation, the Director must find that the variation is within the spirit of OPM's regulations

and that "the efficiency of the government and the integrity of the competitive service are protected and promoted." 5 C.F.R. § 5.1. A valid variation requires an official record showing (1) the particular practical difficulty or hardship involved, (2) what is permitted in place of what is required by the regulations, (3) the circumstances that protect the integrity of the competitive service, and (4) a statement limiting the application of the variation to the continuation of the conditions which give rise to it. *Id.*

On June 21, 1996, the Director of OPM issued an official "Notice of OPM Variations" granting a variation authorizing the ALJ examinations to be scored in a different manner than that prescribed in 5 C.F.R. § 930.203(e), the regulation that embodied the 1993 scoring formula. The purpose of the variation was to implement the 1996 scoring formula, which was based on a 70-to-100 point scale, and to relieve OPM from having to follow the 1993 regulation, which was based on a 0-to-100 point scale, with a score of 70 points required to pass. Consistent with the requirements of section 5.1, the Director noted for the record that (1) the variation was granted to avoid the practical difficulties that would be involved in revising the final ratings of the more than 1,700 candidates on the ALJ register; (2) a transmuted scale of 70 to 100 is frequently used in unassembled civil service examinations (i.e., examinations based on education, experience, or past achievement, rather than a written test); (3) the transmuted scale of 70 to 100 is consistent with merit system principles; and (4) the variation is limited to transmutation scales used by unassembled examinations specified in the regulation.

The variation issued in connection with the 1996 scoring formula satisfied each of the requirements of 5

C.F.R. § 5.1. Before issuing a variation, the Director must find that the variation adheres to the spirit of the OPM regulations as a whole (not simply the spirit of the particular regulation being displaced) and that the variation protects and promotes the efficiency of the government and the integrity of the competitive service. 5 C.F.R. § 5.1. Those are very general criteria, and it is plain to us from the language of section 5.1 that the application of those standards was intended to be left mainly to the discretion of the Director of OPM, not to be closely scrutinized by the Merit Systems Protection Board or this court. The regulation protects against capricious use of the power to issue variations by requiring documentation of the need for the variation and by requiring that the Director issue a variation only upon concluding that the variation would be consistent with the efficiency of the government and the integrity of the competitive service. While a clear abuse of the Director's discretion in making those judgments could be challenged on review, we hold that there was no such clear abuse of discretion in this case.

In the first place, the variation cannot be said to be inconsistent with the spirit of the OPM regulations simply because 5 C.F.R. § 930.203(e) required a 100-point scale and the 1996 scoring formula did not. The whole point of the variation was to abandon the 0-to-100 point scale in favor of a 70-to-100 point scale for the graded portions of the ALJ examination under which anyone with the requisite experience would be deemed to have earned a 70-point passing score. If a variation is invalid because it departs from the requirements of the very regulatory provision that the variation displaces, it is hard to imagine any variation of consequence that would be found valid. Moreover, the OPM regulations make clear that the

requirements of 5 C.F.R. Part 300 are to be applied in a practical manner consistent with administrative feasibility. Section 300.101 states that "the purpose of this subpart is to establish principles to govern, as nearly as is administratively feasible and practical, the employment practices of the Federal Government generally, and of individual agencies. . . ." (emphasis added). *See also* 5 C.F.R. § 300.102(a) ("This subpart is directed to implementation of the policy that employment practices be practical in character. . . ."). The 1996 scoring formula mirrored the 1993 formula in most respects, differing only in ways that OPM regarded as necessary to avoid giving failing scores to applicants who were qualified for the ALJ position based on their experience. It was that same objective – to ensure that any applicant with the requisite experience would earn a passing score – that had previously led OPM to add 10.9 points to each applicant's total score calculated under the 1993 formula.

In the notice accompanying the variation, the OPM Director pointed out (and the evidence before the Board established) that other federal competitive examinations were conducted on a 70-to-100 point basis. As one witness explained, the "standard federal examining practice" is to "convert[ ] raw or weighted scores to a final scale of 70 to 100." The fact that other competitive examinations are graded on a 70-to-100 point basis is strong evidence that such a "compressed" scoring scale is not inconsistent with the spirit of OPM's regulations and does not violate the integrity of the competitive civil service. Moreover, OPM's decision to give a passing score of 70 to all applicants who have seven years of relevant legal experience and who complete the other portions of the examination does not reflect an abandonment of merit selection principles; it

simply treats as at least minimally qualified for the ALJ position all persons with sufficient experience in the field. Given the important role that relevant experience has always played in the selection of ALJs, we are not prepared to conclude that the use of experience as establishing a baseline of minimal qualification is inconsistent with the integrity of the competitive service or OPM's regulations governing employee selection.

To be sure, the use of a 70-to-100 point scale for the four graded portions of the examination has the effect of according greater weight to the veteran preference points that are added to the applicants' examination scores. But almost any change in the grading system would be likely to have an effect on the relative impact of veteran preference points. For example, if OPM had retained the 1993 scoring formula, which produced an 80 percent failure rate after the ALJ examinations were rescored following the Inspector General's investigation, that formula presumably would have excluded a very large percentage of veteran applicants from consideration for the ALJ positions and denied them any benefit at all from their veteran preference points. Under such a regime, a veteran who scored 69 would lose out to a nonveteran who scored only one point higher. In that circumstance, it could be said that the five or ten point bonus provided by the Veterans' Preference Act would be diluted by the use of a high failure rate.

Similarly, the ultimate impact of the veteran preference points can be dramatically affected by the range of scores that the examination graders employ in the grading process. If the graders used a wide range of scores in grading the best to the poorest performing candidates, so that the scores ranged, for example, from a low score of 40

to a high score of 95, the effect of the veteran preference points would be reduced. On the other hand, if the graders bunched the scores more closely together so that, for example, the total scores ranged from a low score of 75 to a high score of 85, the effect of the veteran preference points would be increased. In short, contrary to the assumption underlying the Chief Administrative Law Judge's decision with respect to the variation, there is no scoring system that is wholly neutral with respect to the impact of veteran preference points. It is therefore incorrect to say that the variation granted by OPM's Director in 1996 was inconsistent with the integrity of the competitive service simply because it increased the effect of veteran preference points as compared to the scoring formula that it replaced. Before we could conclude that the Director was mistaken in finding that the 1996 scoring formula was consistent with the integrity of the competitive service, we would have to be persuaded that the new scoring system had the effect not merely of increasing the relative effect of the veteran preference points but of virtually displacing the competitive system altogether.

We are not persuaded that the 1996 scoring formula has had that effect. Thus, we hold that the OPM Director did not abuse his discretion in concluding that the 1996 variation was consistent with the spirit of OPM's regulations, promoted the efficiency of the government, and preserved the integrity of the competitive service. Accordingly, we hold that the 1996 variation validly relieved OPM from the obligation to adhere to the 1993 formula specified in section 930.203(e) to rank ALJ applicants.

C

We also disagree with the Board's conclusion that the variation did not have the effect of relieving OPM of the need to comply with the requirements of 5 C.F.R. Part 300. As noted, the Board rejected OPM's reliance on the variation on the ground that, by its terms, the variation excused OPM only from compliance with the specific regulation governing the scoring of ALJ examinations, 5 C.F.R. § 930.203(e); it did not expressly relieve OPM from the need to satisfy the general requirements governing employment practices found in 5 C.F.R. § 300.103. If the Director intended to vary from the requirements of section 300.103, the Board reasoned, he was required to expressly refer to that regulation as displaced.

Under the Board's reasoning, the Director of OPM would be required to trace the implications of any variation throughout the system of OPM regulations and would have to identify explicitly any regulatory provisions that the variation was intended to waive. That is an unreasonable burden to place on the agency. The point of a variation is to implement a particular procedure that would otherwise be inconsistent with regulatory requirements. In issuing such a variation, the OPM Director obviously intends to waive any regulations inconsistent with the new procedure set forth in the variation. It makes no sense to suggest that the failure to specifically recite some regulation that would be inconsistent with the procedure prescribed in the variation indicates that the Director intended not to waive that regulation and thus for the variation to have no effect.

In the present case, for example, the OPM Director made clear in the variation notice that OPM intended to

authorize the use of the 1996 formula in place of the 1993 formula. If the Board's reading of the variation is correct, then the Director performed a futile act by authorizing the use of a new formula that was impotent from its creation because it did not meet the requirements of Part 300.

OPM acknowledges that the 1996 scoring formula does not comply with all of 5 C.F.R. § 300.103. Ms. Turpenoff, the director of ALJ staffing operations at OPM during the relevant time period, testified that OPM "didn't have any of [the] job analysis data" that would be required by 5 C.F.R. § 300.103 to construct a new scoring formula. She further testified that OPM "decided that the best course of action was to . . . convert[] raw or weighted scores to a final scale of 70 to 100," but because OPM "had no job analysis data" to support this new formula, the agency "asked for a variation."

From the record, it is clear to us that the request for a variation was based not only on OPM's decision to vary the terms of the 1993 scoring formula, but also on OPM's inability to do a complete validation of the new scoring formula as quickly as was necessary to fill the pending ALJ vacancies. Thus, it is apparent that the variation was intended to waive the requirement of compliance not only with the regulation establishing the 1993 scoring formula, 5 C.F.R. § 930.203, but also with the relevance and job analysis requirements of 5 C.F.R. Part 300 by directing the use of an unvalidated scoring formula in place of the 1993 formula.

As long as the Director of OPM cannot be said to have abused his discretion in concluding that the variation was within the spirit of the OPM regulations and that the efficiency of the government and the integrity of the

competitive service were protected and promoted, the Director's discretion to issue a variation must be upheld. As we have explained above, we do not believe the Director abused his discretion in making those findings. We therefore reverse the Board's ruling that the Director's variation violated OPM's regulations.

IV

In sum, we hold that the Board had jurisdiction to address the question whether OPM's 1996 scoring formula for ALJ examinations was inconsistent with the provisions of 5 C.F.R. § 300.103. On the merits, however, we reverse the Board's decision on that issue because of the variation granted by the OPM Director under 5 C.F.R. § 5.1. We hold that the Board lacked jurisdiction to address the claim that the 1996 scoring formula violated the Veterans' Preference Act, and we therefore reverse the Board's order with respect to that issue on jurisdictional grounds. In light of our disposition on the merits, we find it unnecessary to address the other substantive and procedural issues raised by OPM and the Meeker petitioners, such as whether the Meeker petitioners were denied due process by not being made parties to the Board proceedings at the outset, and whether the Board's remedial order was proper.

Each party shall bear its own costs for this appeal.

REVERSED.

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

MISCELLANEOUS DOCKET NO. 684

KAY COLES JAMES,
Director, Office of Personnel Management,

Petitioner,

v.

ANN S. AZDELL and DONALD B. FISHMAN,

Respondents,

and

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

ON PETITION FOR REVIEW

(Filed Nov. 2, 2001)

Before MICHEL, RADER, and GAJARSA, *Circuit Judges*.

RADER, *Circuit Judge*.

The Director of the Office of Personnel Management petitions for review of a final decision by the Merit Systems Protection Board. Ann S. Azdell and Donald B. Fishman (Azdell) respond. The Director replies.

On October 20, 2000, the Merit Systems Protection Board determined that OPM's implementation of a new scoring formula in 1996 for administrative law judge (ALJ) examinations did not meet the basic requirements set forth at 5 C.F.R. § 300.103(a) and (b) and violated the

Veterans' Preference Act. The Board ordered OPM to rescind and cancel all scores assigned under the 1996 scoring formula, to reconstruct the ALJ register and all certificates of eligibles that were issued while the 1996 scoring formula was in effect, and to provide priority consideration for future ALJ vacancies to class members who were adversely affected by the 1996 scoring formula. On July 13, 2001, the Board denied OPM's motion for reconsideration and affirmed its October 20, 2000 decision.

Pursuant to 5 U.S.C. § 7703(d), OPM may obtain review of a final Board order if OPM determines "that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, [sic] regulation, or policy directive." The statute further provides that "[t]he granting of the petition for judicial [sic] review shall be at the discretion of the court of appeals."

OPM states that the Board's "erroneous decision" will have a substantial impact upon the civil service for two reasons. First, OPM argues that the Board's conclusion that it possesses jurisdiction to review OPM's implementation of the Veterans' Preference Act "presents a serious and substantial question of law that will have a recurring importance." Second, OPM asserts that "the Board's conclusion that OPM's 1996 scoring formula violates 5 C.F.R. § 300.103 constitutes an improper interference with OPM's administration of the competitive examination system for administrative law judges." Azdell agrees that "the Board's final decision concerns an interpretation of civil service law and that its decision will have an impact on personnel management."

"[I]t is the duty of this court independently to assess whether an exercise of our discretionary jurisdiction is warranted because the decision below will have a substantial impact on civil service law." *Devine v. Sutermeister*, 724 F.2d 1558, 1562 (Fed. Cir. 1983). Given the ramifications of the Board's decision on the conduct of competitive examinations for ALJ positions, we conclude that it is appropriate for this court to review the Board's final decision.

Accordingly,

IT IS ORDERED THAT:

OPM's petition for review is granted. Once docketed, OPM's petition for review will be consolidated with the earlier petition for review, no. 01-3057, filed by Murray M. Meeker, F. William Roggeveen, Jay E. Levine, and William S. Colwell.

FOR THE COURT

10/31/01
Date

/s/ Randall R. Rader
Randall R. Rader
Circuit Judge

cc: Todd M. Hughes, Esq.
William L. Bransford, Esq.
Lynn A. Jennings, Esq.
Joyce G. Friedman, Esq.

ANN S. AZDELL and DONALD B. FISHMAN
Appellants, v. OFFICE OF PERSONNEL
MANAGEMENT, Agency, And MURRAY M. MEEKER,
F. WILLIAM ROGGEVEEN, JAY E. LEVINE,
RUSSELL L. DOTY, WILLIAM S. COLWELL,
Intervenors.

DOCKET NUMBERS DC-300A-97-0368-R-1,
DC-300A-97-0368-R-2, DC-300A-97-0369-R-1,
DC-300A-97-0369-R-2

MERIT SYSTEMS PROTECTION BOARD

July 13, 2001

William L. Bransford, Esquire, and Debra L. Roth, Esquire, Washington, D.C., for the appellants.

Julie L. Ferguson-Queen, Esquire, Washington, D.C., for the agency.

William F. Fox, Jr., Esquire, Washington, D.C., for intervenors Meeker, Roggeveen, Levine, and Colwell.

Russell L. Doty, Esquire, Arvada, Colorado, intervenor, pro se.

Karin L. Kizer, Esquire, and Harris Weinstein, Esquire, Washington, D.C., for the Disabled American Veterans, amicus curiae.

BEFORE

Beth S. Slavet, Chairman

Barbara J. Sapin, Vice Chairman

Susanne T. Marshall, Member

OPINION AND ORDER

¶ 1 Pursuant to 5 U.S.C. § 7703(d), the Director of the Office of Personnel Management (OPM) has requested that the Board reconsider its final decision in this case, *Azdell v. Office of Personnel Management*, 87 M.S.P.R. 133 (2000). For the reasons set forth below, we DENY the petition for reconsideration and AFFIRM the final decision.

BACKGROUND

¶ 2 The factual background and procedural history of this case are discussed at length in the Board's October 20, 2000 Opinion and Order. *See Azdell*, 87 M.S.P.R. at 136-49, ¶¶ 2-23. The following background is limited to the facts that are pertinent to the issues raised on reconsideration.

¶ 3 On February 7, 1997, the appellants filed this appeal challenging OPM's 1996 scoring formula for administrative law judge (ALJ) examinations. Initial Appeal File (IAF), Vol. 1, Tab 1. OPM created the scoring formula pursuant to a variation[1] granted by the Director of OPM to

[1] Pursuant to 5 C.F.R. § 5.1, the Director is authorized, whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regulation, to grant a variation from the strict letter of the regulation if such a variation is within the spirit of the regulations, and the efficiency of the Government and the integrity of the competitive service are protected and promoted. Whenever a variation is granted, section 5.1 requires the Director to note the official record to show: (a) the particular practical difficulty or hardship involved, (b) what is permitted in place of what is required by the regulations, (c) the circumstances which protect or promote the efficiency of the Government and the integrity of the competitive

(Continued on following page)

the regulation at 5 C.F.R. § 930.203(e). *Id.* at encl. 2. The appellants alleged, inter alia, that the formula was unlawful because it reduced the merit portion of the exam by 70 percent and increased, by about three-fold, the value of veterans preference points above the 5 or 10 percent that Congress intended to give preference eligible applicants. *Id.* They requested that their appeal be heard and adjudicated as a class action, with the class comprised of all ALJ applicants who were not preference eligible. *Id.*

¶ 4 On July 18, 1997, the Board's Chief Administrative Law Judge (CALJ) granted the appellants' request to hear their appeals as a class action. IAF, Vol. 2, Tab 21 (Order). He certified the class as including all non-preference eligible candidates who were on the ALJ register as of February 7, 1997. *Id.* Pursuant to the CALJ's order, OPM provided the appellants' representatives with a list of the names and addresses of all members of the class. IAF, Vol. 2, Tab 22. On August 14, 1997, the appellants served notice of the class action on the listed individuals by regular mail. IAF, Vol. 2, Tab 23. The notice provided information concerning the appeal and permitted each person to opt out of the class by notifying the CALJ within 35 days. IAF, Vol. 2, Tab 21 (Notice).

¶ 5 A hearing was held on October 29, 1998. *See Azdell,* 87 M.S.P.R. at 141-44, ¶¶ 9-13. OPM's witnesses explained that the 1996 scoring formula involved multiplying an applicant's weighted score by .3 and then adding 70 points. *See, e.g.,* Hearing Transcript (HT) 65 (Testimony of

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service, and (d) a statement limiting the application of the variation to the continuation of the conditions which gave rise to it.

Carol Bullock, Deputy Director of Office of ALJs). The purpose of the .3 multiplier was to "transmute" the scores from a 100-point scale to a 30-point scale. *Id.* However, OPM did not augment the weighted scores with the appropriate number of veterans preference points before transmuting the applicants' scores to the 30-point scale. Instead, OPM transmuted the scores, added 70 points to each applicants' transmuted score, and then added veterans preference points to this total for the preference-eligible applicants. OPM believed that it was required to award 5 or 10 points no matter what scale it used. *See* HT 157-161 (Testimony of Donald McCauley, OPM Personnel Staffing Specialist).

¶ 6 OPM added 70 points so that all applicants completing the examination automatically achieved a passing score, i.e., a weighted score of 0 * .3 + 70 = 70. *See* HT 64 (Testimony of Carol Bullock). OPM believed that the variation to the scoring system was justified because it found that under the old formula 80 percent of the applicants who met the minimum qualifications[2] would fail, and OPM had not conducted a job analysis on the appropriate "cut" score. *See* HT 117 (Testimony of Sherry Turpenoff).

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[2] The ALJ application states that the minimum qualifications requirements are "a total of 7 years experience as an attorney preparing for, participating in, and/or reviewing formal hearings or trials involving administrative law and/or litigation at the Federal, state or local level. In addition, applicants must demonstrate that they have had 2 years of qualifying experience at a level of difficulty and responsibility characteristic of at least senior level GS-13, or 1 year characteristic of at least GS-14 or GS-15 Federal Government attorneys actively involved in administrative law and/or litigation work." Agency Hearing Exhibit 1 at 1.

Consequently, all preference eligibles who met the minimum qualifications and completed the examination passed and were eligible for 5 or 10 preference points, which were applied on a 30-point scale. According to the appellants' expert, the effect of the 1996 scoring formula was to dramatically change the rankings on the ALJ register, with preference eligible candidates entitled to 10 points advancing by an average of 110.5 places on the register and preference eligible candidates entitled to 5 points advancing by an average of 191.8 places. *See* Appellant's Hearing Exhibit II at 6.

¶ 7 In an initial decision on the merits, the CALJ found that OPM's use of the 1996 scoring formula violated its regulations and the Veterans' Preference Act (VPA). *Azdell v. Office of Personnel Management,* MSPB Docket No. DC-300A-0368-I-1, -0369-I-1 (Initial Decision, April 22, 1999); IAF, Vol. 5, Tab 125. He found that Congress intended that veterans' preference points be added to ALJ examination scores based on a 100-point scale and that only preference eligibles who receive a passing grade on the examination are entitled to receive preference points. *Id.* at 19-39. The CALJ issued an initial decision concerning relief on September 23, 1999, in which he ordered OPM to rescind and cancel all scores assigned under the formula. He also ordered OPM to determine which class members would have been within reach for selection if a proper formula had been used and to award those class members priority consideration for future vacancies. *Azdell v. Office of Personnel Management,* MSPB Docket No. DC-300A-0368-I-2, -0369-I-2 (Initial Decision, Sept. 23, 1999); Initial Relief File (IRF), Vol. 2, Tab 64 at 24-25.

¶ 8 Intervenors Levine, Meeker, and Roggeveen[3] filed a joint petition for review challenging the CALJ's merits initial decision. Petition for Review File (PFRF), Tab 19. They objected, inter alia,[4] that notice of the appeal had not been given to ALJ applicants who were preference eligibles and stated that "[a]s a consequence of this failure, all preference eligible ALJ applicants, as a class, have been denied the opportunity to present their views and to participate in this appeal." *Id.* at 6, 10-11. Similarly, intervenor Colwell argued that the CALJ's initial decision "must not be allowed to stand in light of the obvious failure to date of providing *all* affected veterans proper notice and a right to be heard." PFRF, Tab 32 at 2 (emphasis in original). The intervenors sought to represent a class of all preference eligible applicants on the ALJ register. *See* PFRF, Tab 19 (Motion for Permission to Intervene dated Oct. 21, 1999). In an order dated November 3, 1999, the Board stated that it would reserve ruling on this request. PFRF, Tab 23, at 2. The issue was not revisited, however, and no class of preference eligibles was certified prior to the issuance of the Board's final decision on October 20, 2000.

¶ 9 In its final decision, the Board found that OPM's implementation of the scoring formula constituted an employment practice for the purposes of Subpart A of 5

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[3] For purposes of this decision, "intervenors" refers to intervenors Colwell, Levine, Meeker and Roggeveen. Intervenor Doty, who is a non-preference eligible applicant and a member of the class, did not submit a brief or otherwise participate in the reconsideration proceedings.

[4] The issues raised at the petition for review stage of these proceedings are discussed in the Board's October 20, 2000 decision. *Azdell*, 87 M.S.P.R. at 147-49, ¶¶ 20-23.

C.F.R. Part 300. *Id.* at 149, ¶ 25. Thus, the Board held that the appeal was within its jurisdiction under 5 C.F.R. § 300.104(a), which allows a candidate to appeal an employment practice applied by OPM that he believes violates a basic requirement in section 300.103. *Id.* at 155, ¶ 38. The Board held that the scoring formula violated section 300.103(a) because OPM did not show that it was based on job analysis data that would justify the changes in qualification standards and examination procedures for the ALJ position, and that it was not developed according to professionally accepted examination development and validation principles. *Id.* The Board further held that the scoring formula violated section 300.103(b) because it was not rationally related to performance in an ALJ position. *Id.* In addition, the Board found that OPM's use of the scoring formula violated the Veterans' Preference Act because it awarded veterans' preference points on a scale of 30 earned points rather than the scale of 100 earned points that Congress intended and by awarding a passing grade without determining that the applicants were qualified for the position. *Id.* at 150, ¶ 27. As a result of the formula, the Board found that class members were denied the opportunity to be considered for particular ALJ positions. *Id.* at 150-51, ¶ 29.

¶ 10 The Board ordered OPM to take the following actions: 1) rescind and cancel all scores assigned under the 1996 scoring formula, inform each candidate remaining on the ALJ register who was assigned such a score that the score has been rescinded and canceled, and discontinue using any register constructed through the use of the 1996 formula; 2) reconstruct the ALJ register and all certificates of eligibles in accordance with the Board's decision; 3) compile a list of the class members entitled to priority

consideration, and include on that list information concerning the number of times each member is entitled to receive consideration, the geographic location or locations in which each is to be given that consideration, and, with respect to areas in which more than one candidate is entitled to priority consideration, the order in which consideration is to be given; 4) ensure that each class member entitled to priority consideration is given such consideration by the agencies that employ ALJs until the number of priority considerations that member has received equals the number of positions for which the member was denied consideration, or until the member is offered an ALJ position, whichever occurs first; and 5) at the appellants' request, meet with the appellants' representatives and explain how the list was created and make available for inspection and copying all documents and other information used to create the list. *Id.* at 168-69, ¶¶ 61-64.

¶ 11 OPM exercised its statutory right to request reconsideration by the Board on November 24, 2000. Reconsideration File (RF), Tab 1. OPM submitted its brief in support of reconsideration on January 16, 2001, RF, Tab 7, and the appellants responded with a brief in opposition on February 22, 2001, RF, Tab 15. The intervenors filed a brief on February 20, 2001. RF, Tab 14.

ANALYSIS

¶ 12 Under 5 U.S.C. § 7703(d), the Director of OPM may file a petition for reconsideration of a final decision of the Board if the Director determines 1) that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and 2) that the Board's

decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. *See* 5 C.F.R. § 1201.119(a). The Board will consider *de novo* the arguments raised by the Director on petition for reconsideration. *Griffin v. Office of Personnel Management,* 83 M.S.P.R. 67, 72 (1999).

¶ 13 OPM argues that the Board does not have jurisdiction over this appeal and that the Board did not properly defer to OPM's interpretation of the Veterans' Preference Act (VPA). RF, Tab 7. The intervenors concur in OPM's brief and also argue that the Board has no authority to award priority consideration and that preference eligible applicants were denied notice and an opportunity to be heard in violation of their due process rights. RF, Tab 14. We address these arguments in turn.

Jurisdiction

¶ 14 The Board may review only those actions made specifically appealable by law, rule, or regulation. 5 U.S.C. § 7701(a) (1996). *See, e.g., Prewitt v. Merit Systems Protection Board,* 133 F.3d 885, 886 (Fed. Cir. 1998) (The Board's jurisdiction is not plenary; rather it is limited to actions designated as appealable to the Board under any law, rule, or regulation). Here, the Board found that it had jurisdiction over these appeals pursuant to 5 C.F.R. § 300.104(a), which provides the Board with authority to hear an appeal from "[a] candidate who believes that an employment practice which was applied to him or her by the Office of Personnel Management violates a basic requirement in § 300.103." *Azdell,* 87 M.S.P.R. at 152, ¶ 32. OPM has defined the term "employment practices" to include "the development and use of examinations, qualifications

standards, tests, and other measurement instruments." 5 C.F.R. § 300.101. The Board found that OPM's implementation of the 1996 ALJ examination scoring formula was an employment practice within this regulatory definition because the use of the scoring formula resulted in the development of a new qualification standard for the ALJ position and in a different use of the four parts of the ALJ examination. 87 M.S.P.R. at 154-55, ¶¶ 36-38.

¶ 15 OPM and the intervenors assert that the Board's jurisdiction over employment practices does not include the addition of veterans' preference points because those points are awarded pursuant to the VPA. OPM contends that the VPA is an exception to the merit systems and merit examining and, therefore, is not an "employment practice" within the meaning of Part 300. RF, Tab 7 at 8. Similarly, the intervenors argue that "[t]he concept of 'employment practice' is simply inapposite to the concept and goals of the statutory veterans' preference." RF, Tab 14 at 10. In making these arguments, OPM and the intervenors are attempting to alter the subject matter of this appeal. The appellants have not challenged the legality of the statutorily-awarded preference points, but rather the manner in which OPM's scoring formula affects the application of those points. For example, in response to question 27 on the appeal form the appellants allege that OPM's "scoring formula is unlawful because it drastically reduces the weight of the merit portion of the exam by 70% and drastically increases (by about three-fold) the value of veterans' preference points above the 5% or 10% preference Congress intended to give preference eligible applicants." IAF, Vol 1, Tab 1. Based on these allegations, the Board determined that "the process embodied in the 1996 scoring formula was an employment practice within

the meaning of 5 C.F.R. § 300.101." *Azdell,* 87 M.S.P.R. at 153, ¶ 34.

¶ 16 We also reject OPM's and the intervenors' broader premise, which appears to be that the term "employment practices" does not include policies and practices that are mandated by Congress. Such an interpretation would effectively eliminate the Board's jurisdiction over OPM employment practices because those practices frequently involve the implementation and administration of policies that have, or ought to have, their bases in law.[5] The narrow interpretation of "employment practices" offered by OPM and the intervenors is at odds with longstanding precedent that holds the term to have a naturally broad and inclusive meaning. *See, e.g., Prewitt,* 133 F.3d at 887; *Dowd v. United States,* 713 F.2d 720, 723 (Fed. Cir. 1983). The Federal Circuit has consistently held that OPM actions do not fall outside the regulatory definition of "employment practices" merely because the policies being applied have their source in a statute.

¶ 17 In *Lackhouse v. Merit Systems Protection Board,* 734 F.2d 1471 (Fed. Cir. 1984), for example, a job applicant

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[5] This was acknowledged at the hearing by Carol Bullock, OPM's deputy director of its Office of ALJs:

> Q: What is OPM's responsibility with regards to examining in the federal government?
>
> A: OPM's responsibility is for developing policies and procedures *implementing the laws* related to examining and for developing and conducting examinations for the competitive service.

HT 58 (emphasis supplied).

challenged OPM's application of the "pass over" provisions found at 5 U.S.C. §§ 3317(b) and 3318(b). Those statutory provisions, now as then, provide that when an appointing authority, for reasons considered sufficient by OPM, has three times considered and passed over a preference eligible who was certified from a register, certification of the preference eligible for appointment may be discontinued provided that he is given advance notice of the discontinuation. The Federal Circuit found that while the "pass over" provisions were enacted by Congress, "that alone does not prevent them from constituting employment practices." 734 F.2d at 1474. The court noted that Lackhouse did not challenge the legality of those provisions but, rather, challenged their application to him in an allegedly discriminatory manner. *Id.*

¶ 18 Another case on point is *Vesser v. Office of Personnel Management*, 29 F.3d 600 (Fed. Cir. 1994), in which an ALJ applicant appealed from OPM's decision to remove him from the register after OPM found that he was barred from becoming an ALJ due to his entitlement to a civil service retirement annuity. OPM argued that the Board had no jurisdiction over the matter because Vesser's disqualification from employment as an ALJ was the result of a statutory bar and not the result of an agency hiring practice. 29 F.3d at 603. OPM maintained that this distinction was significant because only the latter may be termed an "employment practice" as defined in 5 C.F.R. § 300.101. *Id.* Applying the "requisite broad and inclusive meaning to the term employment practices," the Federal Circuit rejected OPM's argument and held that OPM applied an employment practice by removing Vesser from the ALJ register based on his status as an annuitant. *Id.*

¶ 19 As *Lackhouse* and *Vesser* make clear, the Board is not required to consider employment practices in a vacuum, without any consideration of OPM's application of law. To the contrary, once the Board determines it has jurisdiction over an OPM employment practice, it is required to consider whether OPM acted in accordance with law. 5 U.S.C. § 7701(c)(2)(C). *See, e.g., Hamilton v. United States Postal Service,* 58 M.S.P.R. 486, 488 (1993) (An agency action that is not in accordance with law may not be sustained). Therefore, the Board was not deprived of jurisdiction merely because the appellants' claims involved OPM's implementation of veterans' preference laws.

¶ 20 OPM further argues that the Board lacks jurisdiction because, in granting a variation to 5 C.F.R. § 930.203(e), the Director implicitly granted a variation to all of Part 300 of Title 5 of the Code of Federal Regulations. RF, Tab 7, at 14. In its notice of the variation, the Director stated the following:

> 1. OPM has approved a precedent-setting variation to 5 C.F.R. § 930.203(e). That section requires that OPM use in final rating for the Administrative Law Judge examination "a transmuted scale of 0 to 100, with 70 required to pass."
>
> 2. This variation is necessary because OPM used a scale of 70 to 100 to score applications for Administrative Law Judge positions, instead of the "transmuted scale of 0 to 100, with 70 required to pass." Although the use of the 70 to 100 scale was described in the March 1993 announcement for the Administrative Law Judge examination, OPM did not obtain a variation or

modify the regulation to permit the use of such a scale.

3. The variation was granted to avoid the practical difficulty required to revise the final ratings of the more than 1700 candidates on the ALJ register. Such an effort is unnecessary because the transmuted scale of 70 to 100 is frequently used in unassembled competitive examinations like the ALJ examination, and is consistent with merit system principles. The precedent set by this variation is limited to transmutation scales used by unassembled examinations that are specified in regulation.

4. Section 5.1 of civil service rule V requires that like variations be granted in like circumstances. Therefore, if an agency believes it has a case which parallels the one described in this notice, a variation may be requested. Agencies are reminded, however, that variation is appropriate only when no other authority exists to remedy the hardship or practical difficulty. All requests for variation must be sent through the headquarters of the agency or department involved and must be transmitted to the Office of Personnel Management for final action. Agencies do not have authority to approve variations.

IAF, Vol. 1, Tab 1, Encl. 2.

¶ 21 On its face, the variation does not purport to extend beyond paragraph (e) of 5 C.F.R. § 930.203. Nor does OPM's analysis in support of the variation mention Part 300. *See* Agency Hearing Exhibit 59. Nevertheless, OPM maintains that the variation extends to all of Part 300, and states that "[t]his conclusion reasonably results from dovetailing the plain language of the variation

regulation and Part 300." RF, Tab 7 at 15. Specifically, OPM points to language in 5 C.F.R. § 300.101 which states that "[t]he purpose of this subpart is to establish principles to govern, *as nearly as is administratively feasible and practical,* the employment practices of the Federal Government generally, and of individual agencies. . . . " (emphasis supplied). *See also* 5 C.F.R. § 300.102(a) ("This subpart is directed to implementation of the policy that employment practices be practical in character . . . "). OPM infers from this language that where a variation is granted due to practical difficulties or hardships, such variation must implicitly extend to all of Part 300. RF, Tab 7 at 15.

¶ 22 While 5 C.F.R. §§ 300.101 & 300.102 discuss OPM's policies regarding employment practices, section 300.103 sets forth the basic requirements that implement those policies. OPM's assertion that its variation to 5 C.F.R. § 930.203(e) implicitly extends to all of Part 300, including the basic requirements in section 300.103, is inconsistent with 5 C.F.R. § 5.1(b). Section 5.1(b) requires the Director, in granting a variation, to note in the official record what is permitted in place of what is required by the regulations. *See* 5 C.F.R. § 5.1(b).[6] Therefore, if the Director intended to grant a variation to the basic requirements in section 300.103, he was obligated to state what was permitted in place of those requirements. Similarly, if the Director intended to grant a variation to 5

[6] Section 5.1 is discussed above at note 1. The Board's October 20, 2000 decision did not reach the issue of whether the variation was validly granted, i.e., whether the prerequisites of 5 C.F.R. § 5.1 were met. *Azdell,* 87 M.S.P.R. at 133, n.20.

C.F.R. § 300.104(a) in order to eliminate a candidate's right to appeal, the official record would include a statement of what is permitted in place of Board review. Here, the variation is silent as to the requirements of Part 300 and by its terms is limited to section 930.203(e). Accordingly, we find it reasonable to conclude that the variation did not vary the requirements of Part 300.

Deference

¶ 23 OPM and the intervenors argue that the Board did not afford proper deference to OPM's interpretation of the VPA in accordance with the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* RF, Tab 7 at 10-13; RF, Tab 14 at 12-15. The Court's decision in *Chevron* describes a two-step process. First, a court must consider whether the intent of Congress is clear; if it is, then the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. 467 U.S. at 842-43. Thus, "[i]f, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.'" *Regions Hospital v. Shalala*, 522 U.S. 448, 457 (1998), *quoting Chevron*, 467 U.S. at 842-43. However, if the statute is silent or ambiguous with respect to the specific issue, a court must consider whether an agency's answer is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. A court may not substitute its own construction of an ambiguous statutory provision for a reasonable interpretation made by the administrator of an agency. *Id.*

¶ 24 OPM chiefly focuses on the term "earned rating" in 5 U.S.C. § 3309 and argues that the Board must defer to

OPM's interpretation that the 70 points awarded to applicants for meeting minimum qualifications and completing the examination are "earned." RF, Tab 7 at 12. OPM's argument requires that we consider the term "earned" in isolation, contrary to generally accepted rules of statutory construction. *See, e.g., Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 99 (1992) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law"). Both the CALJ and the full Board considered the plain meaning of the statutory provisions at issue, primarily 5 U.S.C. §§ 3309 & 3313; their legislative history, including the passage of the 1953 amendments; and the longstanding regulatory interpretations of OPM and its predecessor, the Civil Service Commission.

¶ 25 As the CALJ noted, prior to 1953, veterans were entitled to have extra points added to their ratings regardless of whether they passed examinations. *See* 58 Stat. 387, ch. 287 § 3 (June 27, 1944); IAF, Vol. 5, Tab 94, Subtab 13. However, in 1953 the VPA was amended to require preference eligibles to achieve passing grades on examinations before veterans' points were added. *See* 67 Stat. 581, ch. 485 § 3 (Aug. 14, 1953); App. Ex. F. Specifically, the CALJ found that section 3, codified at 5 U.S.C. § 3309, provided, "[i]n all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of [certain preference eligibles], and five points shall be added to the earned ratings of [other preference eligibles], who have

received a passing grade. . . . "[7] *Id.* Section 7, codified at 5 U.S.C. § 3313, provided, "The names of the preference eligibles who have received a passing grade shall be entered on the appropriate registers. . . . "[8] *Id.* § 7. As the CALJ discussed, the legislative history of the 1953 amendments provides further guidance as to the purpose of these provisions:

> All veterans will be required to make passing grades before their names are entered on eligible registers. At the present time veterans who do not make a passing grade may have 5 or 10 points added to their earned ratings in examinations and thereby have their names placed on eligible registers in accordance with their augmented ratings. Thus, in many cases, veterans who have not actually earned a passing grade – and to that extent are unqualified to carry out the duties of the position for which they are examined – are placed on registers ahead of non-veterans who have earned passing grades without having any points added to their earned scores.

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[7] The present version of section 3309 provides:

A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to additional points above his earned rating, as follows –

(1) a preference eligible under section 2108(3)(C)-(G) of this title – 10 points; and

(2) a preference eligible under section 2108(3)(A)-(B) of this title – 5 points.

[8] The present version of section 3313 provides in pertinent part:

The names of applicants who have qualified in examinations for the competitive service shall be entered on appropriate registers or lists of eligibles. . . .

H. Rep. No. 849, 83d Cong., 1st Sess., *reprinted in* 1953 U.S.C.C.A.N. 2391, 2391; App. Ex. E.

¶ 26 Thus, by passing the 1953 amendments Congress intended to prevent placement of veterans on the register who are "unqualified to carry out the duties of the position for which they are examined." *Id.* OPM's 1996 scoring formula disregards that purpose by permitting applicants to be eligible for selection even though they do not demonstrate that they possess the knowledge, skills, and abilities (KSAs) needed by ALJs. For example, use of the 1996 scoring formula would award a passing grade to an applicant even if the applicant's performance during the examination process demonstrated that the individual lacked a judicial temperament or legal writing skills.[9]

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[9] OPM was aware that its formula permitted applicants to pass without demonstrating these KSAs, but believed that this was required because it had not conducted a job analysis on the appropriate passing grade or "cut" score. The following testimony by Carol Bullock is illustrative:

> Q: And if an administrative law judge applicant lacked judicial temperament that person would be unqualified for the job; correct?
>
> A: We consider judicial temperament to be important to that job, yes. But the lack of judicial temperament would not be a positive quality for performing the job, yes.
>
> Q: If a person went to the personal interview and as a result of the reference check everyone concluded that the individual should not be an administrative law judge because he or she lacked any judicial temperament that person would be disqualified from the job, would they not?
>
> A: They would not be disqualified because the examination doesn't have a method to fail people who demonstrate that they lack judicial temperament. There isn't a cut score on the panel interview. That hasn't been established based on

(Continued on following page)

¶ 27 The full Board adopted[10] the CALJ's analysis in its final decision. *See Azdell,* 87 M.S.P.R. at 158-161, ¶¶ 43-45. The Board emphasized that when Congress first awarded points to preference eligible candidates in the Veterans' Preference Act of 1944, and when it amended the

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the job analysis basis that was done for the panel interview or for the personal reference inquiry.

Q: But doesn't common sense tell us that that person lacks the minimum competence to succeed on the job?

Ms. Sachen-Gute: Objection. Argumentative.

The Witness: Yes, it does. But it creates –

Judge Streb: Overruled.

The Witness: – a situation in which there is a cut score. And there has to be some job analysis basis to establish that.

By Mr. Bransford:

Q: And that cut score –

A: That has not been done.

HT 88-89.

Q: I asked you earlier about whether you could – whether judicial temperament was a requirement for the job. Wouldn't the same also hold true for legal writing; doesn't somebody need to have a certain level of legal writing in order to be a successful administrative law judge?

A: That, one could presume that.

Q: So there somebody who lacked legal writing skills would most likely not be successful as an administrative law judge; correct?

A: That is probably true. Although we do not have defined a level, a specific level of writing that is a level at which an administrative law judge could not be effective because we haven't done the job analysis work to support that.

HT 103-104.

[10] The Board noted that its decision was limited to the scoring formula being challenged in this appeal. 87 M.S.P.R. at 161, ¶ 46.

VPA in 1953, the standing practice of the Civil Service Commission, since at least 1888, had been to require a 100-point scale for grading applicants in examinations. *Id.* at 159, ¶ 44, *citing* Fifth Report of the U.S. Civil Service Commission at 11, 62-63 (1889) (included in record as agency's hearing exhibit C). The Board further noted that Congress amended the VPA in 1953 to require preference eligibles to achieve a passing grade on civil service examinations before they could be awarded preference points. *Id.* at 159-60, ¶ 45; *see* 5 U.S.C. § 3309 (A preference eligible "who receives a passing grade" is entitled to additional points above his earned rating). The Board found that the legislative history of the 1953 amendment demonstrated that the requirement of a 100-point scale was in effect at that time, and it found that the 70 points OPM awarded applicants on the basis of meeting qualifying experience requirements and completing the ALJ examination were not "earned" points because OPM awarded these points on the basis of an employment practice that did not meet the basic requirements of 5 C.F.R. § 300.103. *Azdell,* 87 M.S.P.R. at 159-60, 162, ¶¶ 45, 47. Therefore, the Board concluded that the 1996 scoring formula awarded veterans' preference points on a scale of 30 points rather than the 100 point scale that Congress intended. *Id.* at 162, ¶ 47. We find no error in the previous determinations by the CALJ and the full Board that congressional intent is clear with respect to the issues of statutory construction involved in this case. Accordingly, both OPM and the Board must give due effect to the unambiguously expressed intent of Congress. *Chevron,* 467 U.S. at 842-43.

¶ 28 The intervenors, unlike OPM, find the veterans' preference statutes to be "extraordinarily clear on their

face: eligible veterans are to be given points above and beyond those point[s] accorded to non-veterans after all of the applicants have been evaluated under all the applicable criteria other than their status as veterans." RF, Tab 14 at 13. The intervenors nevertheless assert that "deference should have been granted by the Board to OPM's 1996 scoring formula and to everything that springs from that scoring formula, including a proper ranking of applicants based, in part, on veterans' preference points." *Id.* The intervenors rely upon *Martin v. Occupational Safety & Health Review Commission,* 499 U.S. 144 (1991), and *Curtin v. Office of Personnel Management,* 846 F.2d 1373 (Fed. Cir. 1988). However, neither of these cases support the proposition that OPM's scoring formula is entitled to *Chevron* deference.

¶ 29 In *Martin,* the Supreme Court differentiated between the functions of the Secretary of Labor and the Occupational Safety & Health Review Commission (OSHRC) to hold that reviewing courts, when faced with an ambiguous regulation promulgated by the Secretary under the Occupational Safety and Health Act of 1970 (OSH Act), may not prefer the reasonable interpretations of the OSHRC to the reasonable interpretations of the Secretary. 499 U.S. at 158. In reaching this conclusion, the Court relied on the regulatory structure and legislative history of the OSH Act to find that Congress intended to invest interpretive lawmaking power in the Secretary and that it intended to delegate to the OSHRC "the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." 499 U.S. at 154 (emphasis in original). Comparing the Board to OSHRC, the intervenors assert that the Board exceeded its "nonpolicymaking adjudicatory powers" by altering "the entire

framework of ALJ application procedures in a manner that is totally inconsistent with the policies initially established by OPM." RF, Tab 14 at 14.

¶ 30 We disagree that *Martin* is applicable here. In adjudicating the merits of the appellants' claims, the Board has not exercised policymaking powers that have been delegated to OPM. Rather, the Board has merely determined, pursuant to its jurisdiction under 5 C.F.R. § 300.104, that OPM has established a scoring formula that violates OPM's basic requirements set forth at sections 300.103(a)-(b). In addition, to the extent that the implementation of the 1996 scoring formula can be viewed as incorporating OPM's interpretation of the VPA, the Board has not attempted to usurp OPM's policymaking function; it has merely applied the *Chevron* analysis in the same manner a court would to find that OPM's interpretation is not consistent with the statute.

¶ 31 The intervenors further assert that the Board has ignored the Federal Circuit's "express admonition to the Board" in *Curtin* that it "should not second guess OPM's determinations pertaining to the ALJ examination." RF, Tab 14 at 14-15. The intervenors have mischaracterized the Federal Circuit's decision. In *Curtin,* the court found that the petitioner's challenge, reduced to its basics, was that OPM might have developed a better technique in one portion of the examination process for assessing the behavior of applicants for the position of ALJ. 846 F.2d at 1378. The court noted that "the board does not sit to second guess the judgments of the professionals who developed the examination for OPM, nor does this court." *Id.* The court did not, as claimed by the intervenors, render an "express admonition" to the Board regarding deference. The court in fact held that "the board

properly analyzed and applied the policies and requirements of the regulations relating to employment practices to the facts" and that the Board's findings were supported by substantial evidence. *Id.* As in *Curtin,* the Board in this case has limited the scope of its review to the issue of whether OPM's scoring formula complies with the basic requirements in 5 C.F.R. § 300.103 and with applicable law.

¶ 32 Finally, we note that even if we were to consider the pertinent statutory provisions to be ambiguous or silent as to the issues before us, it is not clear that OPM's scoring formula is the type of agency interpretation entitled to deference under *Chevron.* The Supreme Court recently stated that while a formal adjudication or notice-and-comment rulemaking is entitled to *Chevron* deference, agency interpretations such as opinion letters, policy statements, agency manuals, and enforcement guidelines do not warrant such deference. *Christensen v. Harris County,* 120 S. Ct. 1655, 1662 (2000). *See also Pitsker v. Office of Personnel Management,* 234 F.3d 1378 (Fed. Cir. 2000) (OPM's informal interpretation of a retirement statute is not entitled to *Chevron* deference). Presumably, the regulatory interpretation that was subject to a formal notice-and-comment rulemaking, and the one that would thereby be entitled to *Chevron* deference, was incorporated in the regulation at 5 C.F.R. § 930.203(e), which set forth a scale of 0-100 for ALJ examinations, with 70 required to pass, and stated that the final passing score of preference eligibles would be augmented by 5 or 10 veteran preference points. Yet, the intervenors do not argue that the Board should defer to the interpretation embodied in the regulation; they argue that the Board should defer to the interpretation embodied in the 1996 scoring formula. To

the extent that the scoring formula could be considered OPM's interpretation of the applicable statutory provisions, we find that the formula is closer to an agency guideline than to formal notice-and-comment rulemaking. Under *Christensen,* such an interpretation is merely entitled to respect, "but only to the extent that [it has] the 'power to persuade.'" *Christensen,* 120 S.Ct. at 1663. As discussed above, we do not find the scoring formula to be a persuasive interpretation of the applicable veterans' preference laws. *Cf. Pitsker,* 234 F.3d at 1383 ("Because OPM's informal interpretation of the statute is unpersuasive, we decline to adopt it").

Authority to Award Priority Consideration

¶ 33 The intervenors assert that the Board's authority to award relief is restricted to remanding this case to OPM for it to "re-think and reformulate its approach to the commissioning of ALJs." RF, Tab 14 at 16-17. The Board's authority to effect a remedy is not so limited. Pursuant to 5 U.S.C. § 1204(a)(2), the Board has authority to order any agency to comply with any order or decision issued by the Board and to enforce compliance with any such order. This authority includes the power to restore, as nearly as possible, the status quo ante. *See, generally, Kerr v. National Endowment for the Arts,* 726 F.2d 730, 733 & n. 3 (Fed. Cir. 1984). In the context of an employment practices appeal, restoring the status quo ante means that prevailing appellants who were denied consideration due to an invalid employment practice are entitled to some form of priority consideration for future vacancies. *Baxter v. Office of Personnel Management,* 44 M.S.P.R. 125, 133 (1990). *See also Petrecz v. Office of Personnel Management,* 33 M.S.P.R. 21, 23 (1987) (The Board has authority to award

priority consideration where a negative suitability determination is reversed).

¶ 34 The intervenors inaccurately assert that the relief ordered by the Board "abrogates the statutory veterans' preference and ... totally eliminates from consideration for appointment all preference-eligible applicants." RF, Tab 14 at 17. This assertion appears to be based on a fundamental misunderstanding of what is meant by "priority consideration." The term "priority consideration" generally means that an applicant will receive *bona fide* consideration by the selecting official before any other candidate is referred for consideration and that the applicant will not be considered in competition with other candidates and will not be compared with them. *See, e.g., Perry v. Department of the Army,* 992 F.2d 1575, 1579-80 (Fed. Cir. 1993); *Myers v. Department of Agriculture,* 29 M.S.P.R. 395, 397 (1985). *Bona fide* consideration does not require that the selecting official actually select the candidate. *See Perry,* 992 F.2d at 1579.

¶ 35 In the instant case, the Board directed OPM to compile a list of class members who are entitled to priority consideration based on whether and how often they were denied consideration for ALJ positions as a result of OPM's use of the invalid scoring formula. *See Azdell,* 87 M.S.P.R. at 168-69, ¶ 61. Thus, only those class members who would have been within reach for selection but for the improper employment practice are entitled to priority consideration.[11] The intervenors and other preference

[11] According to OPM, only nine of the class members are entitled to priority consideration. *See* Compliance File, Tab 5 at 3-4 (April 9, 2001 Order Summarizing Status Conference). OPM's determination,

(Continued on following page)

eligibles are not precluded from being selected for appointments. As the Board previously explained:

> If an agency asks for a certificate of eligibles and there are no class members entitled to priority consideration within that geographic region, or the selecting official does not select any of the class members referred for priority consideration, OPM could then refer a certificate of eligibles to the employing agency in which applicants are properly afforded the competitive advantage to which their preference eligible status entitles them.

87 M.S.P.R. at 167, ¶ 58. We discern no error in affording a remedy to class members who lost consideration due to the invalid scoring formula.

Due Process

¶ 36 The intervenors assert that preference eligible applicants were denied due process because they did not receive notice of this appeal prior to the CALJ's issuance of an initial decision on the merits. RF, Tab 14 at 17-22. They concede that in "ordinary agency adjudication," an agency may not have an obligation to provide notice to non-parties. *Id.* at 21. They contend, however, that because the Board was aware that the relief sought by the appellants could detrimentally affect preference eligible applicants, "[t]his knowledge alone triggers an obligation to notify and to permit full and meaningful participation." *Id.*

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however, is the subject of an ongoing enforcement proceeding. *Azdell v. Office of Personnel Management*, MSPB Docket Nos. DC-300A-97-0368-C-1, -0369-C-1.

¶ 37 The Fifth Amendment to the Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Supreme Court has held that, at a minimum, the Due Process Clause requires that deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for a hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). As the Court explained, "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.* at 314. An individual asserting a violation of his due process rights must show that he was deprived of life, liberty, or property. *See, e.g., Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538 (1985) (Respondents' federal constitutional claim depends on their having had a property right in continued employment). The intervenors state that they and many other preference eligible applicants were highly placed on the ALJ register and had a substantial expectation of eventual employment. RF, Tab 14 at 18. They claim a "substantial property interest in the process – which interest has been taken away from them through the actions of the Board." *Id.*

¶ 38 A similar argument was rejected in *White v. Office of Personnel Management,* 787 F.2d 660, 663-66 (D.C. Cir.), *cert. denied,* 479 U.S. 885 (1986). In that case, White, an ALJ applicant, argued that he was entitled to a hearing before his application could be denied. *Id.* at 663. The court concluded that White failed to demonstrate that denying his application to become an ALJ constitutes a deprivation of a constitutionally-protected liberty or property interest. *Id.* at 663-64. The court noted that "[t]he

situation might be different if the United States had excluded White from all government employment." *Id.* at 664. White also claimed a property interest in his spot on the ALJ register. *Id.* He had advanced from fifth place to first place on the register, but then OPM abolished the register and instituted a new application procedure. *Id.* The court found no property interest based on White's high placement on the register, explaining:

> We decline to find the government constrained to afford White a hearing before it may change its employment application procedures. While we can sympathize with White's frustration at having his position on the selection register abolished, we do not think the government is constrained to fulfill White's hope of selection.

Id. at 666. *See also Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972) (A unilateral expectation of employment is not a property right under the Constitution). While the court did not indicate whether White was preference eligible, that would not change the result.[12] Veterans' preference points improve an applicant's ranking

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[12] The intervenors do not discuss or attempt to distinguish *White,* but instead cite three cases that are inapposite: *Thurber v. Brown,* 5 Vet. App. 119 (Vet. App. 1993) (application for health benefits); *Ressler v. Pierce,* 692 F.2d 1212 (9th Cir. 1982) (applications for Section 8 rent subsidies); *Kelly v. Railroad Retirement Board,* 625 F.2d 486 (3rd Cir. 1980) (application for disabled child's annuity). All three cases involve discrete areas of administrative law that are remote from the context of this appeal. Furthermore, the Ninth Circuit's decision in *Ressler,* which was relied upon by the *Thurber* court, has not been followed by other Circuit Courts of Appeals. *See, e.g., Hill v. Group Three Housing Development Corp.,* 799 F.2d 385, 390-91 (8th Cir. 1986); *Eidson v. Pierce,* 745 F.2d 453, 460 (7th Cir. 1984).

on the register, but they do not assure an appointment. Therefore, while preference eligible applicants are favored in the application process, they do not hold a "substantial property interest in the process" as the intervenors claim. *See* RF, Tab 14 at 18.

¶ 39 Although the intervenors frame the issue in terms of due process, a related question is whether the CALJ erred by not joining the intervenors and other non-party preference eligibles as necessary parties to this action. The Board does not have its own rule on joinder of persons but is guided by Rule 19 of the Federal Rules of Civil Procedure. *See, e.g., Webb v. Office of Personnel Management,* 37 M.S.P.R. 541, 543 n.3 (1988); *Special Counsel v. Zimmerman,* 36 M.S.P.R. 274, 285 n.8 (1988); *Dowd v. Office of Personnel Management,* 16 M.S.P.R. 521, 522 (1983). Rule 19(a) provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to

> venue and joinder of that party would render venue of the action improper, that party shall be dismissed from the action.

Fed. R. Civ. P. 19(a) (2000).

¶ 40 The first joinder standard, which is prescribed in Rule 19(a)(1), is designed to protect those who already are parties by requiring the presence of all persons who have an interest in the litigation so that any relief that may be awarded will effectively and completely adjudicate the dispute. *See* 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane (Wright, Miller & Kane), *Federal Practice and Procedure* § 1604 at 41 (3d. ed. 2001). For example, in *Dowd* the Board ordered the employing agency to be joined as a necessary party after finding that in its absence complete relief could not be accorded should the appellant prevail. 16 M.S.P.R. at 522. Here, however, joinder of the intervenors is not necessary to effectuate the appellants' requested relief.

¶ 41 The second test set out in Rule 19(a) relates to situations in which the action cannot be effectively adjudicated because the absentee claims an interest in the subject matter of the action and disposing of the case in the person's absence may prejudice either those already before the court or the absentee. 7 Wright, Miller & Kane § 1604 at 51. The Supreme Court has explained that this provision of Rule 19 "obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on nonparties simply because they are not 'bound' in the technical sense." *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 110 (1968). Instead, a tribunal must consider the extent to which the judgment may as a

practical matter impair or impede a nonparty's ability to protect his interest in the subject matter. *Id. See also United States v. San Juan Bay Marina*, 239 F.3d 400, 406 (1st Cir. 2001) (a party is necessary under Rule 19(a) only if they claim a "legally protected interest" relating to the subject matter of the action).

¶ 42 For example, in *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466 (9th Cir. 1986), several environmental organizations sued to restrain the National Park Service (NPS) from approving mining plans and access to permits in Alaska's national parks until complying fully with the National Environmental Protection Act. 803 F.2d at 467. The NPS moved to join all miners having approved or pending operations plans, but the district court denied the motion. *Id.* On appeal, the Ninth Circuit upheld the district court's ruling on the joinder motion, finding that the absent miners, although affected by the litigation, did not possess the requisite legally protected interest in the subject matter. *Id.* at 468. The court defined the subject matter of the dispute as concerning NPS procedures regarding mining approval. *Id.* at 469. The court acknowledged that all miners were "interested" in how stringent the requirements would be. *Id.* Nevertheless, the court found that the miners had no legal entitlement to any given set of procedures. *Id.* Accordingly, the court concluded that denial of the joinder motion was not an abuse of discretion. *Id.*

¶ 43 Similarly, in the instant case preference eligible applicants have some interest in the outcome of this litigation because the relief ordered by the Board may affect the manner in which these applicants can compete for future ALJ vacancies. That does not mean, however, that they possess a legally protected interest in the subject

matter of this appeal. Preference eligible applicants hold no legal entitlement in OPM's scoring formula. Thus, they have not been deprived of any legal rights, including their right to have OPM comply with veterans' preference statutes and regulations. While it may have been feasible to join all of the preference eligible applicants who were on the ALJ register as of February 7, 1997, or to permit them to form a separate class,[13] the CALJ did not abuse his discretion by not doing so. *See Panter v. Department of the Air Force,* 22 M.S.P.R. 281, 282 (1984) (adjudicative error which is not prejudicial to a party's substantive rights provides no basis for reversal). Finally, the Board has fully weighed and considered the arguments of the intervenors both on petition for review and again on reconsideration. With the exception of the intervenors' due process arguments which we have addressed above, we note that most of the arguments that the intervenors have raised concerning the validity of the 1996 scoring formula and the Board's jurisdiction to consider the implementation of this formula have been similar or virtually identical to the arguments advanced by OPM and rejected by the Board.

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[13] As part of their motion to intervene at the petition for review stage of these proceedings, the intervenors sought to represent a class of all preference eligible applicants on the ALJ register. *See* PFRF, Tab 19. In an order dated November 3, 1999, the Board stated that it would reserve ruling on the intervenors' request. PFRF, Tab 23 at 2. To the extent that the Board has not previously ruled on the class action request, it is denied. The intervenors have not demonstrated that they meet the requirements of the Board's regulation at 5 C.F.R. § 1201.27 or the requirements of Fed. R. Civ. P. 23.

ORDER

¶ 44 Accordingly, and upon reconsideration, we affirm our final decision in this case. The Director may seek judicial review in the U.S. Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(d).

NOTICE TO THE APPELLANTS REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Codes, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission

Office of Federal Operations

P.O. Box 19848

Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the of the [sic] Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals

for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

Robert E. Taylor

Clerk of the Board

Washington, D.C.

ANN S. AZDELL and DONALD B. FISHMAN, Appellants,
v. OFFICE OF PERSONNEL MANAGEMENT, Agency,
and MURRAY M. MEEKER, F. WILLIAM ROGGEVEEN,
JAY E. LEVINE, RUSSELL L. DOTY, and
WILLIAM S. COLWELL,
Intervenors.

DOCKET NUMBERS DC-300A-97-0368-I-1, DC-300A-97-0369-I-1, DC-300A-97-0368-I-2, DC-300A-97-0369-I-2

MERIT SYSTEMS PROTECTION BOARD

October 20, 2000

William L. Bransford Esquire, and Debra L. Roth, Esquire, Washington, D.C., for the appellants.

Kimya Jones, Esquire, Washington, D.C., for the agency.

Murray M. Meeker, Esquire Alexandria, Virginia, intervenor, pro se.

F. William Roggeveen, Esquire, Woodland, California, intervenor pro se.

Jay E. Levine, Esquire, Carlsbad, California, intervenor, pro se.

Russell L. Doty, Esquire, Arvada, Colorado, intervenor, pro se.

William S. Colwell, Esquire, Springfield, Virginia, intervenor, pro se.

Stephen L. Purcell, Esquire, Washington, D.C., for the Disabled American Veterans, amicus curiae.

BEFORE

Beth A. Slavet, Acting Chairman

Susanne T. Marshall, Member

Member Marshall issues a concurring opinion.

OPINION AND ORDER

¶ 1 Several intervenors filed a joint petition for review, and the Office of Personnel Management (OPM), two additional intervenors, and the appellants have each filed a cross petition for review of two initial decisions issued by the Board's Chief Administrative Law Judge (CALJ). The CALJ issued the first initial decision, addressing the merits of the appellants' appeal, on April 22, 1999, and he issued the second initial decision, addressing relief issues, on September 23, 1999. For the reasons set forth below, we DENY the intervenors' joint petition for review. We GRANT OPM's cross petition for review to the extent that it challenges the CALJ's findings that the variation OPM issued under 5 C.F.R. § 5.1 was invalid, and we DENY the remainder of OPM's cross petition for review. We DENY the appellants' cross petition for review. We also DENY the cross petitions for review filed by intervenors Colwell and Doty. We VACATE the merits initial decision to the extent that it invalidated the variation OPM issued pursuant to 5 C.F.R. § 5.1, and we REVERSE the initial decision to the extent that it found that the employment practice at issue in this case violated the equal employment opportunity basic requirement set forth at 5 C.F.R. § 300.103(c). We also VACATE the relief initial decision to the extent that it constituted an advisory opinion concerning the appellants' rights in the event that

OPM develops a new Administrative Law Judge (ALJ) examination. Finally, we AFFIRM the remainder of the merits initial decision, and the remainder of the relief initial decision, AS MODIFIED by this Opinion and Order.

BACKGROUND

¶ 2 Pursuant to its authority to conduct competitive examinations for ALJ positions, OPM promulgated the regulation at 5 C.F.R. § 930.203.[1] *See* 5 U.S.C. §§ 1104(a)(2),

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[1] This section reads as follows:

§ 930.203 Examination

(a) *Periodic open examination.* Applicants for entrance into the competitive service as administrative law judges will be examined periodically in open competition as announced by OPM. Applications received by OPM during such periods of open competition will be reviewed as a group.

(b) *Minimum qualifications.* All applicants must demonstrate in their written applications and supporting materials that they meet the qualifying experience requirements in OPM Examination Announcement No. 318.

(c) *Supplemental qualifications.* Applicants who meet minimum qualification requirements will be assigned a score on the supplemental qualifications statement described in the examination announcement.

(d) *Participation in examination procedures.* Applicants who meet minimum qualification requirements and are assigned a score on the supplemental qualifications statement become eligible to compete for a final rating through participating in three additional examination procedures described in the examination announcement:

(1) A written demonstration;

(2) A panel interview; and

(3) A personal reference inquiry.

(Continued on following page)

1302(a), 3105. This section requires all applicants for an ALJ position to demonstrate in their written applications and supporting materials that they meet the qualifying experience requirements in OPM Examination Announcement No. 318. 5 C.F.R. § 930.203(b). The qualifying experience required by the examination announcement includes the following: (1) 7 years as a duly licensed and authorized attorney under the laws of a state, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the Constitution; (2) 7

(e) *Final rating.* Applicants who complete the examination procedures described in paragraphs (c) and (d) of this section will be assigned a final numerical rating based on a weighted sum of the scores for each of the four parts, transmuted to a scale of 0 to 100, with 70 required to pass. For applicants entitled thereto, the final passing score will be augmented by 5 or 10 veteran preference points.

(f) *Preparation of certificates.* As agencies request certificates of applicants from registers to consider in filling vacant administrative law judge positions in various geographic areas, all applicants who are eligible and available for those positions will be ranked to identify the best qualified applicants to be certified. Eligible applicants who have completed the final rating process will be ranked on the basis of assigned final ratings, augmented by veteran preference points if applicable. At least three eligible applicants will be certified to the employing agency for consideration for each vacancy.

(g) *Appeal of rating.* Applicants who obtain an ineligible rating or applicants who are dissatisfied with their final rating may appeal the rating to the Administrative Law Judge Rating Appeals Panel, Office of Personnel Management, Washington, DC 20415, within 30 days after the date of final action by the Office of Administrative Law Judges or such later time as may be allowed by the panel.

5 C.F.R. § 930.203 (2000).

years of experience as an attorney preparing for, participating in, and/or reviewing formal hearings or trials involving administrative law, and/or litigation at the Federal, state or local level; and (3) 2 years of qualifying experience at a level of difficulty and responsibility characteristic of at least senior level GS-13, or 1 year characteristic of at least GS-14 or GS-15, Federal government attorneys actively involved in administrative law and/or litigation work. Appellants' Hearing Exhibits (ApHE), Exhibit P. According to the regulation, applicants who meet the experience requirements are assigned a score on the supplemental qualifications statement (SQS) described in the examination announcement. 5 C.F.R. § 930.203(c). Essentially, the SQS is a document in which applicants describe their experience for the purpose of demonstrating that they possess the essential knowledge, skills, and abilities (KSAs) found through a job analysis to be essential for successful performance in an ALJ position. ApHE, Exhibit P at 8. The regulation further provides that applicants who meet minimum qualification requirements and are assigned a score on the SQS become eligible to compete for a final rating through participating in three additional examination procedures: a written demonstration (WD), a panel interview (PI), and a personal reference inquiry (PRI). 5 C.F.R. § 930.203(d). The regulation provides that applicants who complete the examination procedures will be assigned a final numerical rating based on a weighted sum of the scores of each of the four parts of the examination, transmuted to a scale of 0 to 100, with 70 required to pass. 5 C.F.R. § 930.203(e). Prior to 1990, OPM assigned the following weights to the four parts of the examination: the SQS accounted for 63% of the final weighted score, and the WD, PI, and PRI each accounted for 12% of the final weighted score. ApHE, Exhibit G at

42.[2] The regulation provides that final passing scores will be augmented by 5 or 10 veteran preference points for applicants who are entitled to such points. *Id.; see* 5 U.S.C. §§ 2108 and 3309. When an agency requests a certificate of applicants from the ALJ register to consider in filling vacant ALJ positions in various geographic areas, OPM provides the agency with a list of eligible and available applicants ranked on the basis of their assigned final ratings, augmented by veteran preference points, if applicable. 5 C.F.R. § 930.203(f). At least three eligible applicants are certified to the employing agency for consideration for each vacancy. *Id.*

¶ 3 In September, 1990, OPM issued a document entitled "Study of the Administrative Law Judge Examination" (the 1990 study), authored by Dr. Amiel T. Sharon, a personnel research psychologist employed at the OPM Personnel Resources and Development Center, and Elizabeth Konya, who, at the time, was a personnel staffing specialist with OPM. ApHE, Exhibits G, JJ; Hearing Transcript (HT) at 17, 32. The purposes of the study were "to collect the data necessary to ensure that the examination continues to select the best-qualified candidates for the job and to review several issues pertinent to the examination" through a job analysis that relied heavily on the professional judgments of the incumbent ALJs. ApHE, Exhibit G, Executive Summary. Based on the job analysis data, the study identified the most important job activities, determined which KSAs were required to be a successful ALJ, determined which KSAs were required to

[2] We note that the sum of these figures totals only 99%.

perform each of the important job activities, and determined which part of the ALJ examination measured each of the KSAs. ApHE, Exhibit G at 5. The study recommended that the relative weights of the four parts of the examination be adjusted as follows: SQS – 50%; WD – 20%; PI – 20%; PRI – 10%. *Id.* at 42.

¶ 4 Despite the fact that the regulation provides that the final numerical rating is based on a weighted sum of the scores for each of the four parts of the examination, transmuted to a scale of 0 to 100, with 70 required to pass, the examination announcement that OPM issued in March, 1993, provided that the final numerical ratings would be assigned on a scale of 70-100 and would then be adjusted for veterans' preference where applicable. ApHE, Exhibit P. From October 15, 1993, to June 17, 1996, OPM used a scoring formula whereby an applicant could achieve a total weighted score of 50 on the SQS portion of the examination, 20 on the WD portion, 20 on the PI portion, and 10 on the PRI portion. Agency's Hearing Exhibits (AgHE), Exhibit 3.[3] The individual weighted scores for the

[3] The maximum raw score that an appellant could achieve based on the SQS was 30. To determine the weighted score for the SQS portion of the examination, the raw score was multiplied by 1.67, which meant that an applicant could achieve a maximum weighted score of 50 based on the SQS portion of the examination (30 maximum raw points X 1.67 = 50). The maximum raw score for the PRI portion of the examination was 36, and the raw score was multiplied by 0.28 so that an applicant could achieve a maximum weighted score of 10 on the PRI portion of the examination (36 maximum raw score X 0.28 = 10). The WD maximum raw score was 100, and the raw score for this portion of the exam was multiplied by 0.2 to account for a maximum weighted score of 20 (100 maximum raw score X 0.2 = 20). The PI maximum raw score was 20. Because the maximum weighted score for the PI portion of the examination was 20, the raw score for the PI portion of the

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different parts of the examination were then added to determine the final weighted score. *Id.* OPM then added an additional 10.9 points to each of the final weighted scores. *Id.* Where applicable, veterans' preference points were added to achieve the final rating. *Id.*

¶ 5 In 1996, OPM's Office of Administrative Law Judges (OALJ) rescored or readministered various portions of the ALJ examination. HT at 112.[4] Sherry Turpenoff, the former Director of OALJ, provided a letter to ALJ applicants regarding the rescoring of the examinations. AgHE, Exhibit 40. According to this letter, the SQSs of all applicants were rerated by OPM evaluators who were trained to strictly apply the rating criteria, any WDs which had been scored previously by OPM staff were reevaluated and scored by ALJs in accordance with OPM practice, PRI records were reviewed to ensure that responses were obtained from persons having personal knowledge of the applicant's performance as an attorney, and PI records were reviewed to verify the proper composition of panels and the proper computation of scores. *Id.* Turpenoff testified that OPM also allowed those applicants who had not previously been allowed to complete the examination based on their SQS threshold scores to

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examination also served as the PI weighted score (20 maximum raw score X 1.0 = 20). AgHE, Exhibit 3. Apparently, OPM adjusted the raw scores for the various parts of the examination to comply with the relative weights suggested by the 1990 study.

[4] These actions were taken in response to an investigation conducted by OPM's Office of the Inspector General concerning the possible forgery of the signatures of the rating officials on numerous SQSs. HT at 96-97 (Testimony of Carol Bullock); AgHE, Exhibit N.

complete the examination. HT at 112-13.[5] Upon completion of the rescoring process, the final weighted scores for the applicants fell within a range from 55 to 92 with approximately 80% of the applicants failing to achieve a final weighted score of at least 70. AgHE, Exhibits 66, 67. Turpenoff testified that the application of the 1993 scoring formula "wouldn't work" given the wider distribution of weighted scores following the rescoring process because the addition of 10.9 points "would not have put the bottom applicant at 70 and it would have put the top applicant over 100." HT at 113-14. The agency did not simply apply the regulation at 5 C.F.R. § 930.203(e), because, according to Turpenoff, in order to establish a cut off score, "you have to have analysis data that supports the fact that that is the level of exam score that represents the minimum competency to perform the position. And we didn't have any of that job analysis data." HT at 116. Turpenoff further testified that "[w]e decided that the best course of action was to use the standard federal examining practice for converting raw or weighted scores to a final score of 70 to 100." *Id.*

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[5] OPM promulgated the current version of 5 C.F.R. § 930.203 on February 14, 1991. The prior version of this section provided that applicants would be eligible to complete the WD, PI, and PRI portions of the examination if they were assigned a "basic rating." 5 C.F.R. § 930.203(c) (1990). In order to receive a "basic rating," applicants were required to achieve a minimum score on the SQS. 5 C.F.R. § 930.203(b)(2) (1990). Thus, under the previous version of the regulation, an applicant who met the qualifying experience requirements could have been denied the opportunity to complete the three additional examining procedures and receive a final rating if that applicant did not achieve a sufficiently high SQS score.

¶ 6 Because OALJ proposed to rank applicants on the basis of a scoring system that was not in accordance with 5 C.F.R. § 930.203(e), OPM analyzed the need for a variation from that regulation under 5 C.F.R. § 5.1.[6] AgHE, Exhibit 59. OPM's analysis concluded, however, a problem with the ALJ examination existed because "the Employment Service has transmuted final ALJ ratings to a scale of 70 to 100" without complying with, or requesting OPM to modify, 5 C.F.R. § 930.203 which requires the use of "a transmuted scale of 0 to 100, with 70 required to pass." AgHE, Exhibit 59. The OPM analysis justifying the variation stated that it could "develop and use whatever rating procedures it deems appropriate for ranking ALJ applicants as long as the procedures used comply with competitive merit staffing principles." *Id.* OPM's analysis indicated that the 70 to 100 scale differed from the scale in the regulation in the following two ways: (1) the 70 to 100 scale eliminated ineligible ratings for applicants who met

[6] Pursuant to § 5.1, the Director of OPM is authorized, whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of a regulation, to grant a variation from the strict letter of a regulation if such variation is within the spirit of the regulations, and the efficiency of the government and the integrity of the competitive service are protected and promoted. 5 C.F.R. § 5.1. Whenever a variation is granted, § 5.1 requires the Director to note the official record to show: (a) the particular practical difficulty or hardship involved; (b) what is permitted in place of what is required by regulations; (c) the circumstances which protect or promote the efficiency of the government and the integrity of the competitive service; and (d) a statement limiting the application of the variation to the continuation of conditions which gave rise to it. *Id.*

minimum qualifications;[7] and (2) the 70 to 100 scale provided fewer numerical levels of distinction among eligible applicants who received a final rating. *Id.*

¶ 7 As an additional basis for the variation, OPM concluded that the use of the 70 to 100 scale would avoid unnecessary hardship or practical difficulty because recalculating final ratings based on the 0 to 100 scale would result in lower ratings for nearly all eligibles, and many current eligibles, including preference eligibles, would be rated ineligible. *Id.* The analysis also noted that the variation would avoid the unnecessary hardship or practical difficulty involved in dealing with the flood of personal and congressional correspondence, administrative appeals, and possible court actions that might be expected if OPM were to contact eligibles to notify them that they were ineligible or that their rating had been lowered. *Id.* OPM concluded in its analysis that there was no other way to resolve the problem because "[u]ntil OPM can modify these regulations, the Employment Service must either follow them and recalculate the final ratings or obtain a variation." *Id.* Although the analysis recommended use of a transmuted scale of 70 to 100, it did not propose the means by which to transmute the examination scores, it did not discuss the requirements of 5 C.F.R. § 300.103,[8] and it did not discuss the ranking implications

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[7] Apparently, the drafters of the analysis meant that the variation eliminated ineligible ratings for those applicants who met qualifying experience requirements but failed to achieve a score of 70 based on the weighted scores for the four parts of the ALJ examination.

[8] While, pursuant to regulation, procedures also had to comply with competitive merit staffing principles, the analysis failed to note or otherwise take into account that the development and use of the

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that the addition of veterans' preference points might have on a register developed by using a transmuted scale of 70 to 100. *Id.*

¶ 8 James King, the former Director of OPM, approved the variation on June 21, 1996. Initial Appeal File (IAF), Tab 7, Subtab 4h. King noted that the variation was necessary "because OPM used a scale of 70 to 100 to score applications for Administrative Law Judge positions, instead of the 'transmuted scale of 0 to 100, with 70 required to pass.'" *Id.* King also noted:

> The variation was granted to avoid the practical difficulty required to revise the final ratings of the more than 1700 candidates on the ALJ register. Such an effort is unnecessary because the transmuted scale of 70 to 100 is frequently used in unassembled competitive examinations[9] like the ALJ examination, and is consistent with merit system principles. The precedent set by this variation is limited to transmutation scales used by unassembled examinations that are specified in regulation.

Id.

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procedures it used to rank ALJ applicants had to comply with the basic requirements of 5 C.F.R. § 300.103. *See* 5 C.F.R. § 300.103(a), (b), (c).

[9] An unassembled examination is one which does not require a written test but relies upon an evaluation of education, experience, or past achievement. *See Curtin v. Office of Personnel Management*, 846 F.2d 1373, 1375 (Fed. Cir. 1988); Office of Policy and Evaluation, U.S. Merit Systems Protection Board, *The Rule of Three in Federal Hiring: Boon or Bane?*, Introduction and Background at 4 (1995) ("Another way to assess candidates is by evaluating their training and experience.").

¶ 9 According to the hearing testimony, the actual transmutation formula was only subsequently developed by Carol Bullock of OALJ at the direction of Turpenoff. HT at 70. The formula Bullock developed (hereinafter referred to as the 1996 scoring formula) calculated the final rating for an ALJ applicant by multiplying the sum of the final weighted scores the applicant achieved on each of the four parts of the ALJ examination by 0.3, adding 70 points to that figure, and adding veterans' preference points, if applicable. AgHE, Exhibit 41. Bullock testified that she did not conduct either a study or an analysis to determine whether a rational relationship existed between the formula and the ALJ position. HT at 71. Rather, she merely had the formula reviewed by Don McCauley, a senior staffing specialist who previously served as a personnel research psychologist in OPM's Personnel Resources and Development Center. *Id.*

¶ 10 McCauley testified that Bullock asked him to review the means by which OPM calculated the weighted scores for the SQS and PI portions of the examination to ensure that the changes maintained the relative weights of these parts of the examination at 50% and 20%, respectively.[10] HT at 151-52. McCauley verified that Bullock

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[10] The process used to determine the total weighted score changed somewhat under the 1996 formula. Rather than multiplying the SQS raw score by 1.67 to compute the SQS weighted score, OPM subtracted 5 points from the SQS raw score and multiplied that figure by 2 to arrive at the SQS weighted score. AgHE, Exhibit 41. OPM computed the PI weighted score by subtracting 3 points from the PI raw score and multiplying that figure by 1.176. AgHE, Exhibit 41. According to Carol Bullock, the subtraction of points from the raw scores was necessary to account for the fact that there was no 0 point category for abilities rated by the SQS. HT at 101. Based on this testimony, we presume that 3

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"asked [him] to essentially check the math to make sure that certain numbers computed out a certain way," and he explained that Bullock basically asked him "to make sure that these, the changes that she made in her formula kept the weight of these parts at 50 percent and 20 percent respectively." HT at 151. When asked how long it had

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points were subtracted from the PI raw score to account for the fact that applicants could not be rated "0" for the abilities measured by the PI portion of the examination. However, it appears that the SQS raw score was based on a rating of 6 abilities, while the PI raw score was based on a rating of 4 abilities. AgHE, Exhibit 1 at 6-7, 10, Exhibit 2 at 36-37, 38. Assuming that Bullock's testimony was correct, and that an applicant could receive a rating from 1 to 5 for each of the abilities measured by these portions of the examination to arrive at the corresponding raw score, it is unclear why OALJ decided to subtract 5 points from the SQS raw score, and 3 points from the PI raw score, rather than subtracting 6 points and 4 points from these raw scores, respectively. Under the 1993 scoring formula, an applicant who was rated at the minimum level for each of the abilities assessed under the SQS and PI portions of the exam would receive 14 points toward the final weighted score ((SQS raw score of 6 X 1.67) + (PI raw score of 4 X 1.0)). Nevertheless, under the 1996 adjustment, the same applicant would receive 3.176 points toward the final weighted score (((SQS raw score of 6-5) X 2) + (PI raw score of 4-3) X 1.176). If OALJ subtracted 6 points from the SQS raw score and 4 points from the PI raw score, this applicant would receive no points toward the final weighted score based on an assessment that rated the applicant at the minimum level for each of the abilities assessed under these portions of the examination. If OPM had subtracted 6 points from the SQS raw score and 4 points from the PI raw score, OALJ would have had to adjust the multipliers to achieve the desired results. The maximum raw score for the SQS portion of the examination would have been 24, and the maximum raw score for the PI portion of the examination would have been 16. Thus, to achieve a maximum weighted score of 50 for the SQS portion of the examination, and a maximum weighted score of 20 for the PI portion of the examination, the raw scores for these portions would have had to be multiplied by 2.083 and 1.25, respectively (24 X 2.083 = 50; 16 X 1.25 = 20).

taken him to "go through these computations," McCauley answered, "Not very long. It took 15 minutes, maybe half an hour at the most." HT at 153. McCauley further testified that at the time Bullock asked him to review the calculations for the SQS and PI portions of the examination, she did not tell him what the remainder of the formula was. HT at 154.

¶ 11 When asked whether any analysis had been performed to determine whether there was a rational relationship between the 1996 scoring formula and the ALJ position, Turpenoff testified that the weights assigned to the various parts of the ALJ examination were determined through a job analysis, but she conceded that she did not refer the formula "to anyone for an analysis or study on whether there was a rational relationship between the formula and the job." HT at 144-45. When asked whether she used a professional to develop that formula, she testified that "I consider Carol [Bullock] a professional in examining." HT at 145.

¶ 12 OPM applied the new formula to the weighted scores that applicants had achieved on the ALJ examination beginning on June 18, 1996. AgHE, Exhibit 41. From the documents contained in the record, it appears that OPM issued approximately thirty-one certificates of eligibles for 343 ALJ vacancies based on the ranking of ALJ candidates under the 1996 formula. ApHE, Exhibits T, AA; AgHE, Exhibits 42-50, 52-58.[11] Of the vacancies for

[11] It appears that OPM sequentially numbered the ALJ certificates issued during fiscal year (FY) 1997. For example, certificate WA-AJ-7-0001S0 appears to be the first ALJ certificate of eligibles that OPM issued in FY 1997. AgHE, Exhibit 48. We note that the certificates

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which OPM issued certificates during this period, 306 of the vacancies were within the Social Security Administration (SSA). *Id.*[12]

¶ 13 On September 19, 1996, Harold D. Davis, the President of the National Association of Senior Social Security Attorneys (NASSSA) wrote to Turpenoff complaining that implementation of the 1996 formula depreciated "the value of the merit portion of the examination by decreasing the value of the higher scores relative to the lower scores, while drastically increasing the value of veterans' preference points relative to the rest of the examination." IAF, Tab 1, Enclosure 3. Turpenoff responded by stating that the new formula "brings the ALJ examination in line with the scoring procedures used in competitive service examining for all other Federal occupations. These procedures, based on Title 5 requirements, are intended to provide a consistent basis for applying veteran preference points." IAF, Tab 1, Enclosure 1. On December 9, 1996, Davis sent another letter to Turpenoff, claiming that the application of the 1996 formula "illegally gives veterans an advantage of 16.66% and a disabled veteran an advantage of 33.33% despite the clear intent of Congress to give veterans only a 5% to 10% advantage over other EQUALLY QUALIFIED applicants." IAF, Tab

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numbered WA-AJ-7-0004S0 and WA-AJ-7-0016S0 do not appear in the record.

[12] On July 30, 1999, OPM filed its response to the appellants' request for relief. Relief File (RF), Tab 41. In its response, OPM indicated that 254 appointments were made between June, 1996, and December, 1997, two ALJ appointments were made in 1998, and no agency sought appointment of an ALJ in 1999. *Id.* at 11, *as amended by* RF, Tab 44.

7, Subtab 4c (emphasis in the original). On January 13, 1996, Shirley S. Chater, the former Commissioner of the SSA, wrote to the Director of OPM to express her concern with the application of the 1996 formula and to suggest a meeting between members of their respective offices "to review the impact of the new scoring system on the examination process as well as the composition of the referral lists." ApHE, Exhibit S.

PROCEDURAL HISTORY

¶ 14 On February 7, 1997, counsel for the appellants filed an appeal with the Board's Washington Regional Office claiming that the variation violated 5 C.F.R. § 300.103(a), (b), and (c), and that it discriminated against women and disabled individuals. IAF, Tab 1. Counsel requested that the appeal be heard as a class appeal pursuant to 5 C.F.R. § 1201.27 and Rule 23 of the Federal Rules of Civil Procedure, named Ann S. Azdell and Donald B. Fishman as class representatives, and suggested that the appropriate class should include all applicants under Examination Announcement No. 318 who were not veterans. *Id.* The Board reassigned the appeal from the Washington Regional Office to the Board's CALJ on May 19, 1997. IAF, Tab 17. The CALJ granted the appellants' request for the appeal to be heard as a class appeal, and he designated the class as all non-preference eligible candidates who were on the ALJ register as of February 7, 1997. IAF, Tab 21. He denied agency motions to dismiss the appeal as untimely filed and to dismiss the appeal as moot based on Azdell's appointment to an ALJ position. *Id.* In the notice that it provided to prospective class members, counsel for the appellants alleged that OPM's use of the 1996 scoring formula violated the following regulations

and federal statutes: (1) 5 C.F.R. § 300.103; (2) 5 U.S.C. § 3309; (3) 5 C.F.R. § 300.102; (4) the notice and comment provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559; (5) 5 C.F.R. § 5.1; (6) 5 C.F.R. § 2302(b)(6); (7) Title VII of the Civil Rights Act of 1964; and (8) the Rehabilitation Act of 1973. IAF, Tab 31. The CALJ agreed to bifurcate the adjudication of the appeal into liability and remedy phases. IAF, Tab 41.

¶ 15 On December 20, 1997, OPM filed a motion for partial dismissal of the appellants' appeal, arguing that the Board lacked jurisdiction to determine whether OPM's application of the 1996 scoring formula violated 5 C.F.R. § 300.102; the APA; 5 C.F.R. § 5.1; and 5 U.S.C. § 2302(b)(6). IAF, Tab 49. OPM also argued that the Board had no jurisdiction to determine whether the formula violated the congressional intent of 5 U.S.C. § 3309. *Id.* Following receipt of the appellants' response to this motion, the CALJ issued an order granting OPM's motion in part, finding that the Board lacked jurisdiction to consider whether OPM violated the procedural requirements of 5 C.F.R. § 5.1 and the APA in implementing the 1996 scoring formula. IAF, Tab 56. Prior to the hearing, the CALJ also dismissed the appellants' claim that the variation OPM granted itself under 5 C.F.R. § 5.1 violated 5 U.S.C. § 2302(b)(6) because he found that this subsection does not apply to classes of individuals.[13] IAF, Tab 103.

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[13] This subsection provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority (6) grant any preference or advantage not authorized by law, rule, or regulation to

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¶ 16 Following a hearing and the submission of the parties' post-hearing briefs, the CALJ issued an initial decision in which he found that OPM's use of the 1996 scoring formula was in violation of its regulations and the Veterans' Preference Act. IAF, Tab 125, Merits Initial Decision (MID) at 3. Specifically, he found that implementation of the scoring formula violated 5 C.F.R. § 300.103(a) (an employment practice must be based on a job analysis) and (b) (an employment practice must be rationally related to performance in the position to be filled) because OPM offered no evidence or argument that a person's status as a preference eligible, in and of itself, has any bearing on his or her performance as an ALJ. MID at 15. The CALJ found that the variation OPM granted itself under 5 C.F.R. § 5.1 was invalid because it did not meet the criteria of the Civil Service rule that authorizes such variations.[14] MID at 30-31. He also found that OPM violated the Veterans' Preference Act because application of the formula provided preference eligibles with a greater advantage than Congress intended under the Act, and he

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> any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

5 U.S.C. § 2302(b)(6).

[14] Civil Service rules are promulgated by the President. 5 U.S.C. § 1301. Civil Service Rule V, § 5.1 authorizes the Director of OPM, "whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regulation, to grant a variation from the strict letter of the regulation if such a variation is within the spirit of the regulations, and the efficiency of the Government and the integrity of the competitive service are protected and promoted." Exec. Order No. 10577, 3 C.F.R. 218 (1954-1958), *reprinted in* 5 U.S.C. § 3301 note (1994).

therefore found that application of the formula discriminated on the basis of a nonmerit factor, i.e., preference eligibility, in violation of the basic requirement set forth at 5 C.F.R. § 300.103(c) (an employment practice shall not discriminate on the basis of race, color, religion, sex, age, national origin, partisan political affiliation, or other nonmerit factor). MID at 38-39. He further found that the appellants failed to prove their gender discrimination claim. MID at 43. The CALJ reversed OPM's decision to implement the 1996 scoring formula, and he ordered OPM to discontinue use of the formula and to insure that no additional persons were appointed as ALJs on the basis of scores derived from the formula. MID at 44. After the CALJ issued the initial decision on the merits, the Board granted OPM's request for an extension to file its petition for review of the merits decision until 30 days following the CALJ's decision concerning relief. Petition for Review (PFR) File, Tab 6. Following the issuance of the merits initial decision, several individuals sought to intervene in the proceedings, and the Board granted intervenor status to Murray M. Meeker, Jay Levine, F. William Roggeveen, Russell L. Doty, and William S. Colwell. PFR File, Tabs 5, 16, 18, 23.

¶ 17 The CALJ issued his initial decision concerning relief on September 23, 1999. RF, Tab 64, Relief Initial Decision (RID). As relief, the CALJ ordered OPM to discontinue use of the 1996 scoring formula and any register constructed through the use of that formula, to rescind and cancel any scores assigned under the formula, and to inform candidates who were assigned scores under that formula of this action. RID at 4-5. With respect to class members who had not been appointed as ALJs, the CALJ determined that those class members who would

have been included on certificates issued while the 1996 scoring formula was in effect, and who would have been within reach for selection from those certificates, were entitled to priority consideration for future ALJ vacancies. RID at 9-11. To identify these class members, the CALJ ordered OPM to: (1) identify and produce a copy of the register it used for each certificate of eligibles it issued under the invalid scoring formula; (2) recalculate the rank of each applicant on that register based on a valid formula; and (3) identify, in rank order, each class member who would have been placed on certificates issued during the relevant time period in the absence of the 1996 scoring formula. RID at 11-12.

¶ 18 The CALJ approved OPM's proposed formula to recalculate the rank of each applicant on the register by using the applicants' total weighted scores augmented by veterans' preference points, if applicable. RID at 13; RF, Tab 52 at 4. However, the CALJ ordered that candidates achieving a score below 70 prior to the addition of any preference points to which they may have been entitled were not to be considered for inclusion on any reconstructed certificates. RID at 13.

¶ 19 The CALJ ordered each class member who was determined to be entitled to priority consideration referred for such consideration until the first of the following occurred: (1) the number of priority considerations the member received equaled the number of positions for which the member had been denied consideration, or (2) the member was selected for an ALJ position. RID at 16-17. For class members who had been appointed to ALJ positions, the CALJ did not order further relief. RID at 22. For individuals who opted out of the class, the CALJ found that they were not entitled to priority consideration, but

he found that they were entitled to benefit from the injunctive relief granted in the merits decision, i.e., the discontinuation of the 1996 formula and the assurance that no additional persons would be appointed from an ALJ register based on scores derived from that formula. RID at 22. The CALJ refused to bar OPM from making changes that would affect aspects of the ALJ examination other than that challenged in the appeal, and he denied the appellants' requests to be granted monitoring and consultation rights during the development of a new formula for scoring ALJ applications. RID at 7-8, 23. The CALJ also denied the appellants' request for an order that would require OPM to obtain the Board's approval of any new formula it decides to use to score the ALJ examination. RID at 24.

¶ 20 Meeker, a 5-point preference eligible ALJ applicant, filed a petition for review and an amended petition for review, PFR File, Tabs 8, 14, while Roggeveen, who identified himself as a veteran applicant entitled to preference points, also filed a petition for review. PFR File, Tab 13. Levine identified himself as a 10-point preference eligible applicant on the ALJ register, PFR File, Tab 15, and, although he did not file an individual petition for review, he joined with Roggeveen and Meeker to file a joint petition for review intended to "supersede[ ] all prior Intervenor petitions for review in this matter." PFR File, Tab 19. These intervenors argue that the Board should dismiss the appeals for lack of jurisdiction because "veterans' preference does **not** constitute an *employment practice.*" *Id.* at 8 (emphases in the original). They also argue that the CALJ's determination that OPM violated the Veterans' Preference Act was not supported by the evidence and is contrary to the legislative history of the Act.

Id. at 10. Finally, the intervenors argue that the CALJ's relief decision was based on the false premise that weighted scores below 70 constituted failing scores. *Id.* at 17, 20.

¶ 21 Doty identified himself as a member of the certified class and filed a cross petition for review in which he argues that the remedy ordered by the CALJ is unconstitutional and incomplete because the ALJs who were appointed from certificates issued using the 1996 scoring formula will remain in office. PFR File, Tab 20. Colwell, who identified himself as a veteran who will be adversely affected by the relief granted class members in the relief initial decision, filed a cross petition for review in which he argues that the order requiring priority consideration for class members will effectively deny veterans the opportunity to compete for ALJ positions for an indeterminable time. PFR File, Tab 21.

¶ 22 OPM filed its cross petition for review on November 16, 1999. PFR File, Tab 26. OPM argues that the Board lacks jurisdiction over the appeal because neither the 1996 scoring formula nor the application of veterans' preference points are employment practices. *Id.* at 8. OPM also argues that it did not violate the Veterans' Preference Act, that the CALJ effectively nullified OPM's authority to design competitive service examinations, and that the CALJ erroneously invalidated OPM's variation issued under 5 C.F.R. § 5.1. *Id.* at 12, 18, 22. Finally, OPM argues that the CALJ's order concerning relief contravened the Veterans' Preference Act and civil service statutes. *Id.* at 22.

¶ 23 The appellants filed a cross petition for review and a response to the petition and cross petitions filed by

the intervenors.[15] PFR File, Tab 27. The appellants argue that the formula that the CALJ approved to recalculate the rank of the applicants on the register failed to meet the requirements of 5 C.F.R. § 300.103. *Id.* at 11. They also argue that the approved formula fails to return class members to the status quo ante. *Id.* at 19. They assert that the CALJ erroneously allowed priority consideration to unidentified individuals in advance of priority consideration to class members, and that the CALJ erroneously failed to require hiring agencies to place the reasons for not selecting a class member entitled to priority consideration in writing. *Id.* at 23, 25. Finally, the appellants contend that the petitions for review filed by the intervenors should be denied because they do not accurately articulate the law regarding the 1996 scoring formula and the appropriate relief. *Id.* at 28. The intervenors and OPM filed responses to the appellants' cross petition for review. PFR File, Tabs 28, 31, 32, 42, 46. The appellants filed a response to OPM's cross petition for review. PFR File, Tab 43. The Disabled American Veterans filed a brief as *amicus curiae*.[16] PFR File, Tab 45.

SUMMARY OF THE BOARD'S DECISION

¶ 24 Given the length and complexity of this Opinion and Order, the following is offered as a summary of the major points addressed below. The central issues

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[15] The appellants entitled their submission "Appellants' Petition for Review and Cross Petition for Review on Petitions Filed by Intervenors." PFR File, Tab 26.

[16] We hereby grant the motion of the Disabled American Veterans to appear as *amicus curiae*. 5 C.F.R. § 1201.34(e).

presented in this appeal are (1) whether OPM's 1996 scoring formula, for the purposes of Subpart A of 5 C.F.R. Part 300, constituted an "employment practice;" (2) if so, whether that practice violated a basic requirement of 5 C.F.R. § 300.103; and (3) whether, and the extent to which, class members are entitled to relief. For the purposes of Subpart A of 5 C.F.R. Part 300, the term "employment practice" includes the development and use of examinations, qualification standards, tests, and other measurement instruments.

¶ 25 Under 5 C.F.R. § 930.203, an applicant is required to meet qualifying experience requirements and achieve a total score of 70, based on a sum of the weighted scores for the four parts of the ALJ examination, before they become eligible for inclusion on the ALJ examination. However, under the 1996 scoring formula, applicants were eligible for inclusion on the ALJ register if they met the qualifying experience requirements and completed the examination process, regardless of their scores. In addition, while an applicant's score on the ALJ examination determines his final unaugmented rating under § 930.203, it accounted for only 30% of the available rating points under the 1996 scoring formula. Thus, the 1996 scoring formula at issue in this appeal changed the means by which applicants qualified for inclusion on the ALJ register, and it also changed the use of the four parts of the ALJ examination that applicants were required to complete in order to compete for ALJ vacancies. In light of these changes, we conclude that implementation of the 1996 scoring formula involved the development and use of examinations and qualification standards, and we therefore find that implementation of the 1996 scoring formula

constituted an employment practice for the purposes of Subpart A of 5 C.F.R. Part 300.

¶ 26 OPM's regulations require each employment practice to meet three basic requirements set forth at 5 C.F.R. § 300.103. Each practice must be (1) based on a job analysis to identify the basic duties and responsibilities, and the knowledge, skills, and abilities required to perform the duties and responsibilities; (2) rationally related to performance in the position to be filled, including a showing that the employment practice was professionally developed; and (3) non-discriminatory on the basis of race, color, religion, sex, age, national origin, partisan political affiliation or other nonmerit factor. OPM failed to offer job analysis data to justify the changes in the qualification standards and examination procedures for the ALJ position, and it also failed to show that the 1996 scoring formula was developed according to professionally accepted examination development and validation principles. Furthermore, the disparity in the relative rankings among applicants under the 1996 scoring formula, when compared to their relative rankings under § 930.203, indicates that the use of the 1996 scoring formula was not rationally related to performance in an ALJ position. Therefore, the employment practice did not meet the basic requirements set forth at 5 C.F.R. § 300.103(a) and (b).

¶ 27 In addition to violating basic requirements, OPM's use of the 1996 scoring formula did not accord with the Veterans' Preference Act. The legislative history of the Veterans' Preference Act, as well as the overall history of veterans' preference in the United States, indicate that Congress intended to award a fixed-point advantage to the earned ratings of qualified preference eligible applicants for Federal employment based on a 100-point scale. In this

case, OPM awarded 70 rating points to all applicants who met the minimum qualifying experience requirements and completed the four parts of the ALJ examination. However, because these points were awarded on the basis of an invalid employment practice, they were not earned within the meaning of the Veterans' Preference Act. Thus, when OPM augmented the ratings of preference eligible applicants by 5 or 10 points, it violated the Veterans' Preference Act because it awarded these points on a scale of 30 earned points rather than the scale of 100 earned points that Congress intended.

¶ 28 While OPM's use of the 1996 scoring formula provided preference eligible applicants with more of an advantage than Congress intended, it did not violate the equal employment opportunity basic requirement set forth at 5 C.F.R. § 300.103(c). An applicant's or employee's status as a preference eligible must be considered within the context of federal employment statutes regarding hiring and retention which make clear that Congress intended to provide preference eligible applicants with special consideration beyond that to which they might otherwise be entitled if the consideration was limited solely to their technical or formal qualifications for a position.

¶ 29 Because OPM's use of the 1996 scoring formula did not meet the basic requirements of 5 C.F.R. § 300.103, the CALJ properly awarded relief to those class members adversely affected by use of this formula. In addition, because the harm caused by OPM's use of the formula was to deny class members the opportunity to be considered for particular ALJ positions, he correctly determined that priority consideration for future ALJ vacancies was the appropriate relief to award those class members who were

adversely affected by the invalid employment practice in this case. He also correctly determined that OPM must reconstruct the register and the certificates of eligibles issued while the 1996 scoring formula was in effect to determine the number of priority considerations to which individual class members are entitled. However, because OPM did not have job analysis data to establish that a score of 70 on the ALJ examination was the proper point at which to determine that an applicant was qualified for the position, the CALJ improperly denied relief to those class members who achieved a final score below 70 on the examination.

¶ 30 When reconstructing the register and the certificates issued while the 1996 scoring formula was in effect, OPM must recompute the scores for these portions of the examination in order to ensure that the appellants are placed as nearly as possible in the status quo ante. To accomplish this, OPM must recompute the weighted scores for the SQS and PI portions of the examination using the method that was in effect prior to its use of the 1996 scoring formula. (OPM changed the method by which it computed the weighted scores for these portions of the ALJ examination when it implemented the 1996 scoring formula). Finally, the CALJ properly determined that OPM may give priority consideration to applicants who are entitled to such consideration by a prior court or administrative order before it gives priority consideration to class members entitled to priority consideration in this case.

ANALYSIS

Because implementation of the 1996 scoring formula involved the development and use of qualification standards and examinations, implementation of the formula constituted an "employment practice" for the purposes of Subpart A of 5 C.F.R. Part 300.

¶ 31 In their appeal, the appellants claimed that OPM's use of the 1996 scoring formula was an employment practice that violated a basic requirement of 5 C.F.R. § 300.103 because it drastically reduced the merit portion of the ALJ examination by 70%, and it drastically increased the value of veterans' preference points above the 5% or 10% preference Congress intended to give preference eligible applicants. IAF, Tab 1, MSPB Appeal Form Attachment at 1. OPM and several of the intervenors argue that the Board lacks jurisdiction over this appeal because the addition of veterans' preference points is not an employment practice. PFR File, Tabs 19 at 8, 26 at 8. In addition, OPM argues that the application of a scoring formula is not an employment practice because it occurs after the employment practice that assesses an applicant's job-related qualifications, i.e., the ALJ examination, is implemented. PFR File, Tab 26 at 11.

¶ 32 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board,* 759 F.2d 9, 10 (Fed. Cir. 1985); *see* 5 U.S.C. § 7701(a) ("An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."). OPM's regulations give the Board jurisdiction to consider the

appeal of "[a] candidate who believes that an employment practice which was applied to him or her by the Office of Personnel Management violates a basic requirement in § 300.103." 5 C.F.R. § 300.104(a); *see Maule v. Office of Personnel Management,* 40 M.S.P.R. 388, 392-93 ("Pursuant to its statutory authority under 5 U.S.C. § 1103(a)(5) to execute, administer, and enforce civil service rules and regulations, OPM has both the power to create a right of appeal to the Board by regulation and to limit the scope of such right."), *aff'd,* 892 F.2d 1050 (Fed. Cir. 1989) (Table). Once the Board has jurisdiction over a particular matter, it must sustain the decision of the agency if the decision is supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(A). However, even if the agency's decision is supported by a preponderance of the evidence, the decision cannot be sustained if the employee or applicant for employment shows that the decision was not in accordance with law. 5 U.S.C. § 7701(c)(2)(C).

¶ 33 Part 300 of Title 5, Code of Federal Regulations, sets forth regulations governing particular aspects of employment within the civil service. Subpart A of 5 C.F.R. Part 300 relates to "employment practices" which include "the development and use of examinations, qualification standards, tests, and other measurement instruments." 5 C.F.R. § 300.101.[17] Section 300.103 sets forth three basic

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[17] This section reads as follows:

§ 300.101 Purpose.

The purpose of this subpart is to establish principles to govern, as nearly as is administratively feasible and practical, the employment practices of the Federal Government generally, and of individual agencies, that affect the recruitment, measurement, ranking, and selection of individuals for initial

(Continued on following page)

requirements of employment practices. First, each employment practice must be based on a job analysis to identify: (1) the basic duties and responsibilities; (2) the KSAs required to perform the duties and responsibilities; and (3) the factors that are important in evaluating candidates. 5 C.F.R. § 300.103(a). The second basic requirement is relevance, i.e., there must be a rational relationship between performance in the position to be filled and the employment practice used. 5 C.F.R. § 300.103(b). The regulation also provides that the demonstration of rational relationship shall include a showing that the employment practice was professionally developed. *Id.* The final basic requirement is equal employment opportunity. 5 C.F.R. § 300.103(c). An employment practice cannot discriminate on the basis of race, color, religion, sex, age, national origin, partisan political affiliation, or other nonmerit factor. *Id.* The regulation provides that employee selection procedures shall meet the standards established by the "Uniform Guidelines on Employee Selection Procedures," 29 C.F.R. Part 1607 (EEOC Guidelines). *Id.*

¶ 34 We agree with OPM's argument that the statutorily required addition of veterans' preference points to the earned ratings of competitive service applicants is not an employment practice per se, because the addition of these

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appointment and competitive promotion in the competitive service or in positions in the government of the District of Columbia required to be filled in the same manner that positions in the competitive service are filled. For the purposes of this subpart, the term "employment practices" includes the development and use of examinations, qualification standards, tests, and other measurement instruments.

points to the earned ratings of those applicants entitled to such points does not involve the development and use of examinations, qualifications standards, tests, and other measurement instruments. However, for the reasons set forth below, we find that the process embodied in the 1996 scoring formula was an employment practice within the meaning of 5 C.F.R. § 300.101.

¶ 35 If we contrast the process set forth under the regulation governing ALJ examinations, 5 C.F.R. § 930.203, with the process associated with the 1996 scoring formula, it is clear that the 1996 scoring formula had a substantial impact on the measurement, ranking, and selection of applicants for ALJ positions. Pursuant to the regulation, applicants do not pass, i.e., they are not eligible to be placed on the register, unless they achieve a final unaugmented rating[18] of 70 based on the weighted sum of the scores for the four parts of the ALJ examination, transmuted to a scale of 0 to 100. 5 C.F.R. § 930.203(e); *see* 5 C.F.R. § 201.102(b)(5) ("*Eligible* means an applicant who meets the minimum requirements for entrance to an examination and is rated 70 or more in the examination by OPM."). Thus, if OPM had applied the regulation to the applicants in this case, the applicants' performance on the four parts of the ALJ examination would have determined their final unaugmented ratings. In addition, applicants who did not achieve a final score of at least 70 would not have been entitled to have their ratings augmented by veterans' preference points, and they would not have been

[18] For the purposes of this Opinion and Order, the phrase "final unaugmented rating" refers to an applicant's final rating before it is augmented by the appropriate number of veterans' preference points.

eligible to be placed on the ALJ register. *See* 5 U.S.C. § 3309 ("A preference eligible **who receives a passing grade in an examination for entrance into the competitive service** is entitled to additional points above his earned rating.") (emphasis added); 5 C.F.R. §§ 201.102(b)(5) and 930.203(e).

¶ 36 The practical effect of the 1996 scoring formula was to change the standards for inclusion on the ALJ register and to alter the use of the weighted sum of the scores of the four parts of the ALJ examination. Under the 1996 formula, OPM awarded 70 points to all applicants who met the minimum qualifying experience requirements and completed the four parts of the examination, regardless of their scores on the examination. Implementation of the 1996 scoring formula thereby eliminated the qualification standard that required applicants to achieve a final score of 70 based on the weighted scores for the four parts of the ALJ examination and substituted in its place a qualification standard that required applicants to meet the qualifying experience requirements and to complete the examination. The OPM employees involved in the development of the 1996 formula, as well as those who analyzed the variation to 5 C.F.R. § 930.203(e), clearly understood that applicants who were awarded 70 points were eligible for inclusion on the ALJ register and that application of the 1996 scoring formula would award 70 points to all applicants who met the qualifying experience requirements and merely completed the four parts of the examination. AgHE, Exhibit 59; HT at 70, 85-86 (Bullock testimony); HT at 116, 123-24 (Turpenoff testimony).

¶ 37 In addition, implementation of the 1996 scoring formula effectively changed the "use" of the four parts of the ALJ examination. *See* 5 C.F.R. § 300.101 ("[T]he term

'employment practices' includes the development and use of examinations, qualification standards, tests, and other measurement instruments.") (emphasis added). If OPM had applied 5 C.F.R. § 930.203, the sums of the weighted scores of the four parts of the ALJ examination would have become the applicants' final unaugmented ratings, and would have determined whether the applicants were eligible for inclusion on the ALJ register. In contrast, under the 1996 scoring formula, the sums of the weighted scores derived from the four parts of the ALJ examination accounted for only 30% of the applicants' final unaugmented ratings, and these sums did not determine whether applicants were eligible to be placed on the ALJ register because OPM awarded 70 rating points to all of the applicants who met the qualifying experience requirements and completed the four parts of the ALJ examination, regardless of the scores they achieved on the examination. When compared to the process embodied in the regulation, the application of the 1996 scoring formula resulted in the development of a new qualification standard for the ALJ position and in a different use of the four parts of the ALJ examination. Accordingly, contrary to OPM's argument that the 1996 scoring formula was merely a procedural device applied to transmute the final examination scores to a 70-100 point scale, we find that OPM's use of the 1996 scoring formula constituted an employment practice for the purposes of Subpart A of 5 C.F.R. Part 300.

¶ 38 Because implementation of the 1996 scoring formula was an employment practice, the Board has

jurisdiction under 5 C.F.R. § 300.104(a) to determine whether the application of this employment practice violated a basic requirement of 5 C.F.R. § 300.103.[19] Therefore, we discern no error in the CALJ's decision to analyze OPM's use of the 1996 scoring formula to ensure that it complied with the basic requirements of 5 C.F.R. § 300.103.[20]

Because implementation of the 1996 scoring formula was not based on a job analysis nor rationally related to performance in an ALJ position, this employment practice did not meet the basic requirements of 5 C.F.R. § 300.103(a) and (b).

¶ 39 Pursuant to 5 C.F.R. § 300.103, use of the 1996 formula was required to be based on a job analysis,

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[19] It could be argued that OPM's use of the 1993 scoring formula, whereby OPM determined the applicants' final unaugmented ratings by adding 10.9 points to the scores the applicants achieved on the ALJ examination, was also an employment practice subject to the basic requirements of 5 C.F.R. § 300.103. However, none of the parties to this appeal have challenged OPM's use of the 1993 scoring formula.

[20] In its petition for review, OPM argues that the CALJ erroneously invalidated the variation to 5 C.F.R. § 930.203(e) that OPM granted itself pursuant to 5 C.F.R. § 5.1. PFR File, Tab 26 at 22. However, the subject matter of the variation, the implementation of the 1996 scoring formula, was an "employment practice," and OPM did not grant itself a variation from the regulations set forth in Subpart A of 5 C.F.R. Part 300 with respect to the development or use of this formula. It only granted itself a variation to 5 C.F.R. § 930.203(e). IAF, Tab 7, Subtab 4h. Therefore, we find that the Board has jurisdiction to consider the implementation of the 1996 scoring formula despite the variation. Because the Board's jurisdiction in this case is not dependent on a finding that the variation applied was invalid, we need not resolve this issue, and we vacate the merits initial decision to the extent that it finds the applied variation invalid.

rationally related to performance in the ALJ position, and non-discriminatory on the basis of race, color, religion, sex, age, national origin, partisan political affiliation, or other nonmerit factor. For the reasons set forth below, we find that OPM failed to meet its burden of proving by preponderant evidence that the 1996 scoring formula complied with these requirements. *See* 5 C.F.R. § 1201.56(a)(1)(ii); *Baxter v. Office of Personnel Management,* 44 M.S.P.R. 125, 131 (1990).

¶ 40 As discussed above, the 1996 scoring formula had the practical effect of eliminating the requirement that applicants achieve a final score of 70 based on the weighted sum of the scores for each of the four parts of the ALJ examination; instead, the 1996 scoring formula allowed applicants to be placed on the ALJ register if they met the minimum qualifying experience requirements and merely completed the SQS, PI, PRI, and WD portions of the ALJ examination. The job analysis OPM conducted in 1990 did not address the validity of the minimum qualifying experience requirements and completion of the examination as a measure of acceptable performance as an ALJ.[21] Furthermore, the 1990 study established the relative weights for the various portions of the ALJ

[21] A validation study that OPM conducted in 1980 did associate the type, though not necessarily the length, of qualifying experience with the 18 KSAs that the 1980 study found to be required for the ALJ position. IAF, Tab 95, Subtab 5 at 15 and Table 4. However, during the 1990 study, members of the steering committee eliminated four of these KSAs and revised five others. AgHE, Exhibit 2 at 8. While the 1990 study associated the KSAs with each of the four parts of the ALJ examination, *id.* at 24 and Table 10, it made no attempt to associate the minimum qualifying experience requirements with the KSAs or the job activities that the study identified as important in the position.

examination. AgHE, Exhibit 2 at 42-43. Although the 1996 scoring formula did not affect the relative weights of the different portions of the ALJ examination as they related to each other, it reduced the relative weight of each portion of the examination as it related to the final unaugmented rating by 70%. For example, prior to implementation of the 1996 scoring formula, an applicant could earn 10 points towards his final unaugmented rating by achieving a maximum raw score on the PRI portion of the examination; following OPM's implementation of the 1996 scoring formula, an applicant who achieved a maximum raw score on the PRI portion of the examination would earn only 3 points towards his final rating. OPM did not offer job analysis data to justify or explain this reduction in the weight assigned to the various portions of the ALJ examination. Because OPM did not establish that the changes brought about by the implementation of the 1996 scoring formula were based on job analysis data, OPM failed to prove that the implementation of the scoring formula satisfied the basic requirement set forth at 5 C.F.R. § 300.103(a).

¶ 41 Furthermore, OPM failed to demonstrate a rational relationship between the implementation of the 1996 scoring formula and performance in the position to be filled. A demonstration of rational relationship includes a showing that the employment practice was professionally developed. 5 C.F.R. § 300.103(b). While we have no reason to question Turpenoff's testimony that Bullock developed the formula, and that she is a professional in the field of examining, the Federal Circuit and the EEOC guidelines have interpreted the concept of "professional development" of an employment practice as encompassing not only the personnel, but also the procedure, through which the

practice was developed and applied. For example, in *Curtin v. Office of Personnel Management,* 846 F.2d 1373, 1378 (Fed. Cir. 1988), the court, in discussing the application of 5 C.F.R. § 300.103(b), stated, "The uncontroverted evidence is that the test has been developed and applied in a manner wholly in consonance with professionally accepted examination development and validation principles." The EEOC Guidelines provide:

> The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education and standard textbooks and journals in the field of personnel selection.

29 C.F.R. § 1607.5(C) (parentheticals omitted); *cf. Morris v. Office of Personnel Management,* 14 M.S.P.R. 578, 580 (1983) (in finding that OPM failed to prove that the use of a qualification standard was based on a job analysis, the Board noted that the Federal Personnel Manual required applicant appraisal methods to be approved by a professional psychologist). While the 1996 scoring formula may have been developed by a professional in the field of examining, OPM offered no evidence to establish that Bullock developed the formula according to professionally accepted examination development and validation principles. Furthermore, although Bullock testified that she referred a portion of the formula to McCauley, a former

personnel research psychologist, there is no evidence to suggest that McCauley attempted to validate the use of the formula in accordance with generally accepted professional standards. According to McCauley, he merely "checked the math" to verify that the changes Bullock made with respect to the means used to calculate the weighted scores for the SQS and PI portions of the examination did not affect the relative weight given to these two portions. HT at 152. We conclude from all the record evidence that Bullock developed the 1996 scoring formula on an ad hoc basis to address the problems OALJ encountered after it rescored portions of the ALJ examination and realized that application of the 1993 scoring formula would not achieve the desired results, i.e., final unaugmented ratings within a range from 70 to 100 for all applicants who completed the examination. HT at 113-14 (Turpenoff's testimony). Because OPM did not show that the 1996 scoring formula was professionally developed, we find that it failed to prove a rational relationship between this employment practice and performance in the position to be filled. 5 C.F.R. § 300.103(b); *see Curtin,* 846 F.2d at 1378 (the Board and the court are required to assure that there is a rational relationship between performance in the position to be filled and the employment practice used, including proof that the employment practice was professionally developed).

¶ 42 In addition to the fact that the development of the 1996 scoring formula was not based on a job analysis nor professionally developed, we also find that the disparity in the final rankings that resulted from the application of this formula demonstrates that a rational relationship did not exist between the employment practice and performance in the ALJ position. It is clear that application of

the formula had a drastic effect on the rankings of the applicants on the ALJ register. The appendix to this Opinion and Order provides a thorough explanation of the effect that each of the various scoring formulas, i.e., the scoring formula set forth at 5 C.F.R. § 930.203, the 1993 scoring formula, and the 1996 scoring formula, had on individual final ratings. In addition, OPM has offered no evidence to rebut findings contained in a statistician's report submitted by the appellants which found that, within the pool of 1,068 applicants, implementation of the 1996 scoring formula allowed 10-point preference eligibles to advance an average of 110.5 places on the ALJ register over non-preference eligible applicants, while it allowed 5-point preference eligibles to advance an average of 191.8 places. ApHE, Exhibit II at 6. The applicants themselves did nothing to account for the disparity; the effect on the final ratings and the relative standing of the individual applicants on the ALJ register was strictly a function of OPM's application of the 1996 formula to an examination process that the applicants had already completed. If we assume that the employment practice OPM used to rank ALJ candidates prior to the implementation of the 1996 scoring formula complied with the basic requirements of 5 C.F.R. § 300.103, including the rational relationship requirement contained in § 300.103(b), it is difficult to imagine a scenario in which any valid employment practice could produce the drastic disparity that implementation of the 1996 scoring formula produced in this case.

Because OPM's implementation of the 1996 scoring formula did not meet the basic requirements of 5 C.F.R. § 300.103, OPM improperly awarded 70 rating points to applicants for meeting the minimum qualifying experience requirements and completing the four parts of the ALJ examination. Then, when OPM added 5 or 10 points to the final ratings of the applicants entitled to veterans' preference points, it violated the Veterans' Preference Act by affording these applicants more of an advantage than Congress intended.

¶ 43 The Veterans' Preference Act provides that "A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to [an] additional [5 or 10] points above his earned rating." 5 U.S.C. § 3309. The CALJ found that OPM's implementation of the 1996 scoring formula was not in accordance with law, and thus a violation of 5 U.S.C. § 7701(c)(2)(C),[22] because it provided preference eligibles with a greater advantage than Congress intended to provide them under the Veterans' Preference Act. MID at 38-39. The CALJ discussed the pertinent provisions of the Veterans' Preference Act and their legislative history to conclude that Congress intended veterans' preference points to be added to examination scores based on a 100-point scale. For the reasons set forth below, we agree with this conclusion.

¶ 44 When Congress first awarded points to preference eligible candidates in the Veterans' Preference Act of

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[22] This subsection provides that an agency's decision may not be sustained under 5 U.S.C. § 7701(b) if the employee or applicant for employment shows that the decision was not in accordance with law. 5 U.S.C. § 7701(c)(2)(C).

1944, and when it amended the Act in 1953, the standing practice of the former U.S. Civil Service Commission, since at least 1888, had been to require a 100-point scale for grading applicants in examinations. Fifth Report of the U.S. Civil Service Commission at 11, 62-63 (1889) (included in the record as ApHE, Exhibit C). Executive orders issued by three presidents concerning the Civil Service rules reiterated the requirement of a 100-point scale for the purposes of rating applicants on examinations and of adding points to the earned ratings of those applicants entitled to additional points on the basis of military service. Exec. Order No. 3,801 (Mar. 3, 1923) (President Harding) (ApHE, Exhibit D); Exec. Order No. 5,068 (Mar. 2, 1929) (President Coolidge); Exec. Order No. 5,610 (Apr. 24, 1931) (President Hoover). When Congress passed the Veterans' Preference Act of 1944, the report generated by the House Committee on Civil Service noted that the bill "was carrying into law the present provisions of the Civil Service rules for the addition of 10 points for disability preference and 5 points for nondisability preference." H.R. Rep. No. 1289 (1944), *reprinted in* 1944 U.S.C.C.A.N. 1153, 1154; *see* Norman J. Singer, *Sutherland Statutory Construction* § 48.06 (5th ed. 1992) ("Committee Reports represent the most persuasive indicia of congressional intent in enacting a statute.").

¶ 45 Furthermore, Congress amended the 1944 Act in 1953 to require preference eligibles to achieve a passing grade in examinations for entrance into the civil service before they could be awarded veterans' preference points.[23]

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[23] The 1953 legislation amended the Veterans' Preference Act of 1944 to provide:

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A letter from the Chairman of the Civil Service Commission to the Chairman of the House Post Office and Civil Service Committee included in the legislative history of the amendment demonstrated that the requirement of a 100-point scale was still in effect at that time. MID at 29; *see* H.R. Rep. No. 849 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2391, 2394.[24] The CALJ also noted that the

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> In all examinations to determine the qualifications of applicants for entrance into the service ten points shall be added to the earned ratings of those persons included under section 2(1), (2), (3), and (5), and five points shall be added to the earned ratings of those persons included under section 2(4) and (6), who have received a passing grade.

Law of August 14, 1953, ch. 485, § 1(a), 67 Stat. 581 (1953). In the report generated by the House Committee on Post Office and Civil Service, the Committee noted:

> The purpose of this legislation is to strengthen the Veterans' Preference Act of 1944 in these respects:
>
> 1. All veterans will be required to make passing grades before their names are entered on eligible registers. At the present time veterans who do not make a passing grade may have 5 or 10 points added to their earned ratings in examinations and thereby have their names placed on eligible registers in accordance with their augmented ratings. Thus, in many cases, veterans who have not actually earned a passing grade-and to that extent are unqualified to carry out the duties of the position for which they are examined-are placed on registers ahead of nonveterans who have earned passing grades without having any points added to their earned scores.

H.R.Rep. No. 849 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2391.

[24] With regard to the effect that the proposed amendments would have on the civil service, the Chairman of the Civil Service Commission wrote:

> The Commission regards the provisions for veterans to make a passing grade before becoming eligible and having their names entered on the registers with the additional points for preference as unusually worthy and in the

(Continued on following page)

requirement of a 100-point scale was consistent with OPM's regulations concerning examining systems, and the specific OPM regulation concerning ALJ examinations. MID at 28-30; *see* 5 C.F.R. §§ 337.101(a), (b), 930.203(e). In light of the history of veterans' preference laws, the CALJ concluded that Congress created a fixed value for veterans' preference in the examination and selection process, and he further concluded that Congress intended veterans' preference points to be added to earned ratings based on a 100-point scale. MID at 29. Given the history of veterans' preference and the fact that the House Committee on Civil

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> interest of veterans generally. . . . The change will assure that veterans, like citizens generally, are qualified for appointment. . . . It is believed that the provision will substantially increase the public reception of the veterans' preference provisions of the law. Critics will no longer be able to point to the fact that veterans are required to be considered for appointment even though unqualified.

This letter also advocated the use of the term "passing grade," rather than the use of "70 percent" or "70 per centum," to indicate that an applicant had earned a passing grade in an examination for entrance into the competitive service. To differentiate between the concept of 70% performance and the 70 points required to pass an examination, the Chairman wrote:

> A passing grade in civil service examinations represents the minimum competence necessary to perform acceptably the duties of a position. It is usually expressed as 70 points but not as 70 percent. Both in government and commercial schools, for example, it is traditional to hold that a stenographer must be 85% accurate or she is not qualified (i.e., she is given a score less than 70 points). Seventy percent accuracy would be unacceptable. Similarly a chauffeur must be found to use safe driving habits much more than 70 percent of the time, and a machinist cannot be tolerated who finishes acceptably only 70 percent of his material.

H.R. Rep. No. 849 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2391, 2394.

Service indicated that the bill that became the Veterans' Preference Act of 1944 was carrying the provisions of the Civil Service rules into law, we discern no error in the CALJ's conclusion that Congress intended veterans' preference points to be added to earned ratings based on a 100-point scale. We also discern no error in the CALJ's conclusion that Congress amended the Veterans' Preference Act in 1953 to ensure that unqualified preference eligible applicants were not placed ahead of applicants who had earned passing scores by requiring preference eligibles to earn passing grades on examinations before they could be awarded veterans' preference points and placed on registers. MID at 20-22; *see* 5 U.S.C. § 3309.

¶ 46 Yet, while we agree with the CALJ's ultimate finding that implementation of the 1996 scoring formula violated the Veterans' Preference Act, we do not adopt the full extent of his reasoning. Essentially, the CALJ concluded that OPM could not assign a passing score, i.e., 70 rating points, to an applicant based solely on the fact that the applicant met qualifying experience requirements and completed the examination. MID at 22-28. The CALJ based this conclusion on the legislative history of the 1953 amendment to the Veterans' Preference Act, OPM's failure to offer a rational basis for equating the minimum qualification requirements with the minimum competence necessary for acceptable performance as an ALJ, and a long-standing provision of both the Commission and OPM which states, "Except as provided in § 930.203(a)[25] of this

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[25] This section states, "*Periodic open competition.* Applicants for entrance into the competitive service as administrative law judges will be examined periodically in open competition as announced by OPM.

(Continued on following page)

chapter, each applicant who meets the minimum requirements for entrance to an examination *and* is rated 70 or more in the examination is eligible for appointment." 5 C.F.R. § 337.101(a) (emphasis supplied by the CALJ). To the extent that the CALJ's opinion could be read as implying that OPM could never assign a passing score in any examination based solely on an applicant's completion of the examination and fulfillment of the minimum qualification requirements, we believe that such a conclusion goes too far and is not necessary to reach the limited issue in this appeal, namely, whether OPM's award of 70 rating points to applicants in this case who met the qualifying experience requirements and completed the examination violated any requirement of 5 C.F.R. § 300.103.

¶ 47 While we do not reach the larger issue, we nevertheless agree with the CALJ's conclusion that OPM could not award 70 points based on the rationale it offered in this case. As discussed previously, implementation of the 1996 scoring formula was not supported by job analysis data nor shown to be rationally related to performance as an ALJ. *See supra,* ¶¶ 39-42. Because OPM awarded points to applicants on the basis of an employment practice that did not meet the basic requirements of 5 C.F.R. § 300.103, we find that the 70 points OPM awarded applicants on the basis of meeting qualifying experience requirements and completing the ALJ examination were not "earned" within the meaning of the Veterans' Preference Act. Since use of the 1996 scoring formula awarded

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Applications received by OPM during such periods of open competition will be reviewed as a group."

5 C.F.R. § 930.203(a).

70 "unearned" rating points towards the final rating for each applicant, when OPM augmented the final ratings of applicants entitled to veterans' preference points, it awarded veterans' preference points on a scale of 0-30 points that applicants earned through their performance on the four parts of the ALJ examination rather than the 100 point scale that Congress intended. Accordingly, we affirm the CALJ's finding that OPM's use of the 1996 scoring formula was not in accordance with the Veterans' Preference Act. MID at 39; *see* 5 U.S.C. § 7701(c)(2)(C).

Although implementation of the 1996 scoring formula was not in accordance with the Veterans' Preference Act, it did not violate the equal employment opportunity basic requirements of 5 C.F.R. § 300.103(c) because preference eligibility is not a nonmerit factor.

¶ 48 Because he found that the 1996 scoring formula provided preference eligible applicants with a greater advantage than Congress intended, the CALJ also found that implementation of the 1996 scoring formula discriminated on the basis of a nonmerit factor, preference eligibility, and thereby violated the equal employment opportunity basic requirement set forth at 5 C.F.R. § 300.103(c). MID at 16-17. However, we believe that it is inappropriate to refer to preference eligibility as a nonmerit factor in this context. Given the extent to which Congress has enacted legislation to ensure that service in the armed forces, especially service that resulted in a service-connected disability or service performed during a war or in a campaign for which a campaign badge has been authorized, is a factor in determining the selection and retention of employees within the civil service, we believe that OPM's cross petition for review properly

characterized preference eligibility as a "congressionally-authorized *exception* to the merit system and competitive examining process." PFR File, Tab 26 at 10 (emphasis in the original).

¶ 49 Despite the Congressional mandate that Federal personnel management should be implemented consistent with the principle that selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity, *see* 5 U.S.C. § 2301(b)(1), the numerous laws that provide advantages to preference eligible applicants or employees make it clear that Congress intended to except preference eligibles from the strict application of the merit system principles set forth at 5 C.F.R. § 2301 to reward these individuals for service to the country. *See, e.g.*, 5 U.S.C. §§ 2108, 3305(b), 3309-18, 3320, 3351-52, 3363, 3501, 3502(b), 3504, and 4303(e); 10 U.S.C. §§ 943(c)(2), 1784(c); 16 U.S.C. § 1308(b); 22 U.S.C. § 3941(c); 38 U.S.C. §§ 106(f), 7281(e), 7802(5); 39 U.S.C. § 1005(a). While an individual's status as a preference eligible, standing alone, may not indicate that the individual is any more or less qualified to perform a particular position than another candidate, Congress clearly believed that these individuals merited special consideration beyond a consideration limited solely to their technical or formal qualifications for a specific position. Because an individual's status as a preference eligible applicant is not a "nonmerit factor" within the context of 5 C.F.R. § 300.103(c), we reverse the merits initial decision to the extent that it found that the employment practice at issue in this case violated the equal employment opportunity basic requirement of 5 C.F.R. § 300.103(c).

Relief

¶ 50 Because OPM's implementation of the 1996 scoring formula violated the basic requirements of 5 C.F.R. § 300.103, we find that the CALJ properly awarded relief. None of the parties have argued that the CALJ's order concerning injunctive relief was improper, and we discern no error in that portion of the CALJ's relief order that required OPM to rescind and cancel the scores derived under the 1996 scoring formula, to refrain from using the 1996 scoring formula, to insure that no additional persons are appointed as ALJs under that formula, and to discontinue the use of any register constructed through the use of the 1996 formula. RID at 4-5. In addition, we agree with the CALJ's decision to deny any further relief to class members who have been appointed as ALJs. RID at 22; *see Vesser v. Office of Personnel Management,* 65 M.S.P.R. 282, 285 (1994) (in a case where an applicant has been denied consideration for an ALJ position, the Board's authority is limited to ordering OPM to afford the appellant appropriate relief by placing him in the position where he may again be considered for a vacant ALJ position), *aff'd,* 73 F.3d 381 (Fed. Cir. 1995) (Table).

¶ 51 In his relief decision, the CALJ ordered OPM to reconstruct the certificates of eligibles by using the applicants' total weighted scores, i.e., their final test scores, to which veterans' preference points would be added, if appropriate. RID at 13. He also ordered that candidates who achieved a score below 70 prior to the addition of any preference points to which they may be entitled are not to be considered for inclusion on any reconstructed certificates. *Id.* Although the CALJ noted that this method of recalculating scores was not precisely the same as the method used before the 1996 formula was adopted, the

CALJ stated that considering class members with scores below 70 would perpetuate an illegal aspect of the 1996 scoring formula. RID at 14.

¶ 52 An appellant who has been denied consideration for a position for which he was qualified due to an invalid employment practice is entitled to reinstatement to his rightful place on the OPM register and priority consideration as a candidate for any future vacancies at the sites he has indicated would be acceptable to him. *See Vesser,* 65 M.S.P.R. at 285; *Baxter,* 44 M.S.P.R. at 133 (the Board found that applicants who were improperly denied consideration for positions were entitled to some form of priority for future vacancies over and above that which they might establish for themselves by gaining placement through their own efforts on future certificates of eligibles). Thus, we discern no error in the CALJ's decision to award the appellants priority consideration as relief in this appeal.

¶ 53 Nevertheless, the parties raise several arguments concerning implementation of the CALJ's order concerning priority consideration. We agree with the CALJ that the proper method of determining the extent to which individual appellants are entitled to future priority consideration is to require OPM to reconstruct the ALJ register, and the certificates of eligibles issued during OPM's use of the 1996 scoring formula, and to use the reconstructed certificates to determine whether and how often individual appellants were denied consideration for ALJ positions as a result of OPM's use of the invalid scoring formula. RID at 11-12; *see Baxter,* 44 M.S.P.R. at 133 (the Board ordered the agency to give priority consideration to the appellants for the next two competitively-filled vacancies for which they were qualified when they were denied consideration for two vacancies due to the

application of an invalid employment practice). Still, OPM and the appellants have each objected to the use of the formula for the reconstruction ordered by the CALJ, which required OPM to use the applicants' total weighted scores to which the appropriate number of veterans' preference points would be added. RID at 13. The parties also contest the CALJ's order to the extent that it requires OPM to deny relief to candidates who achieved a score below 70 prior to the addition of any preference points. *Id.*

¶ 54 Despite the fact that the formula ordered by the CALJ is entirely consistent with OPM's regulation at 5 C.F.R. § 930.203, which clearly suggests that applicants scoring below 70 on the ALJ examination will not be qualified for inclusion on the ALJ register, OPM argues that there is "no rational or scientific basis for retroactively failing individuals on an exam that was never designed to fail test takers." PFR File, Tab 26 at 24. Although the job analysis that OPM conducted in 1990 established the relative weights that were to be given to the different portions of the ALJ examination, it did not establish that a final score of 70, based on the sum of the weighted scores of the four parts of the examination, was the proper point at which to determine that an applicant did not qualify for inclusion on the register. AgHE, Exhibit 2 at 42-43. Thus, to the extent that the CALJ's relief order would disqualify applicants scoring below 70 based on the sum of the weighted scores of the four portions of the ALJ examination, the order would require OPM to use the ALJ examination in a way that is unsupported by job analysis data. *See* 5 C.F.R. § 300.103(a). We share the CALJ's concern regarding the possible inclusion of apparently "unqualified" candidates on reconstructed certificates of eligibles due to OPM's failure to produce job analysis data

to justify the use of the cutoff score called for by its own regulations. Nevertheless, without such data, it is inappropriate to preclude class members from obtaining relief based on a standard that does not meet the basic requirements of 5 C.F.R. § 300.103. *See Morris,* 14 M.S.P.R. at 581. Therefore, if individual appellants who achieved a final score below 70 are otherwise determined to be entitled to priority consideration, we find that OPM may refer such appellants to employing agencies for future priority consideration.

¶ 55 The appellants argue that the formula the CALJ approved for reconstruction of the certificates is improper because it was not applied to applicants prior to OPM's adoption of the 1996 scoring formula, and because it converts raw scores in the SQS and PI portion of the examination into fewer weighted score points than the 1993 formula did. PFR File, Tab 27 at 15, 19-20. It is arguable that the change with regard to the calculations concerning the SQS and PI portions of the examination should have little effect on a reconstructed register since it would be applied to all applicants who would have been on the register, including those preference-eligible applicants who were appointed to ALJ positions. However, in order to ensure that the appellants are placed as nearly as possible in the status quo ante, we find that OPM must calculate the weighted scores for the SQS and PI portions of the examinations using the method that was used prior to implementation of the 1996 scoring formula. Although we do not find that the change in the method of converting raw scores for the SQS and PI portions of the examination to weighted scores was, in itself, an invalid employment practice, the change was an integral part of the 1996 scoring formula, AgHE, Exhibit 41, and we note that the

change in the way the weighted scores for these portions of the examination were computed can potentially impact the ranking of the applicants on the reconstructed register.[26] Thus, in order to place the appellants more closely into the positions on the register they would have occupied if OPM had not applied the invalid scoring formula against them, we find that OPM must calculate the weighted scores for the SQS and PI portions of the ALJ examination using the method that was in effect prior to the adoption of the 1996 scoring formula.[27] *See Baxter,* 44 M.S.P.R. at 133

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[26] As explained in ¶ 10 n. 10, *supra,* OPM changed the way it calculated SQS and PI weighted scores when it implemented the 1996 scoring formula. The potential impact of the change in the method of computing the weighted scores for the SQS and PI portions of the ALJ examination may best be illustrated by an example. Assume that there are two ALJ applicants, A and B, with identical final test scores of 75 under the 1993 scoring formula and that these final scores were based on the following weighted scores for the four portions of the examination: A – WD: 10, SQS: 35, PI: 20, PRI: 10; B – WD: 15, SQS: 30, PI: 20, PRI: 10. The PI raw score for each applicant must have been 20 (raw score X 1.0 = final weighted score), while the SQS raw score for applicant A must have been 21 (35/1.67 = 21), and the SQS raw score for applicant B must have been 18 (30/1.67 = 18). If we apply the 1996 formula, the PI weighted scores for each of these applicants would remain at the maximum of 20 ((20-3) X 1.176 = 20). However, the final SQS weighted score for applicant A would drop to 32 ((21-5) X 2.0 = 32), while the final SQS weighted score for applicant B would drop to 26 ((18-5) X 2.0 = 26). Thus, while A and B had identical final test scores under the 1993 formula, under the 1996 formula, A (WD: 10, SQS: 32, PI: 20, PRI: 10 = 72) has a higher final test score than B (WD: 15, SQS: 24, PI: 20, PRI: 10 = 69). As a result, if the preference eligible status of each of the applicants was identical, A would have been placed higher on the register than B under the 1996 scoring formula (A's final score: 70 + (.3 X 72) = 91.6; B's final score: 70 + (.3 X 69) = 90.7).

[27] Because we have found that it is inappropriate to exclude applicants from the register and the reconstructed certificates of eligibles on the basis of a final test score below 70, it is immaterial whether OPM chooses to completely implement the 1993 scoring

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(appellants who prevail in their appeal to the Board are entitled to a remedy commensurate with their loss).

¶ 56 The CALJ found that class members who were determined to be entitled to priority consideration were also entitled to be referred for such consideration only until the first of the following occurred: (1) the number of priority considerations the member has received equals the number of positions for which the member was denied consideration, or (2) the member is selected for an ALJ position. RID at 16-17. He also ordered that priority consideration for those members entitled to such consideration would continue through the institution of a new ALJ examination if passing the new examination was a requirement to remain on the ALJ register. RID at 10.

¶ 57 OPM raises several objections to this portion of the CALJ's relief order. First, OPM argues that the relief order violates the Veterans' Preference Act because no veterans will have an opportunity to be considered for ALJ positions while the relief order is in effect. PFR File, Tab 26 at 23. OPM asserts that, based on recent hiring trends, it could take a decade or more for all non-veterans to receive appointments or several priority considerations. *Id.* While this assertion may be true, we reject OPM's argument because the relief order is commensurate with the harm caused by OPM's application of the invalid employment practice. According to a report prepared by the appellant's expert witness, among the 1,068

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formula in reconstructing the register and the certificates because adding a constant of 10.9 to each of the scores would have no effect on the relative ranking of the applicants.

candidates on the ALJ register as of February 7, 1997, application of the 1996 scoring formula allowed preference eligible candidates entitled to 10 preference points to improve their final rankings by an average of 110.5 places on the ALJ register, and it allowed preference eligible candidates entitled to 5 preference points to improve their final rankings by an average of 191.8 places. ApHE, Exhibit II at 6. It is apparent from these figures, and the table set out in the Appendix, that application of the 1996 scoring formula caused substantial harm to the opportunity for numerous non-preference eligible applicants to be considered for ALJ positions.

¶ 58 In addition, the CALJ's relief order does not preclude the possibility that an employing agency might reach a preference-eligible candidate for selection as an ALJ. As the CALJ properly pointed out, priority consideration merely means that the applicant must receive bona fide consideration by the selecting official before any other candidate is referred for consideration. RID at 17; *see Jackson v. Department of the Army,* 69 M.S.P.R. 268, 271 (1996). If an agency asks for a certificate of eligibles and there are no class members entitled to priority consideration within that geographic region, or the selecting official does not select any of the class members referred for priority consideration, OPM could then refer a certificate of eligibles to the employing agency in which applicants are properly afforded the competitive advantage to which their preference eligible status entitles them. By its very nature, priority consideration requires employing agencies to consider applicants who would not otherwise be entitled to such consideration under a strict application of the regulations governing selection through competitive examinations. *See* 5 C.F.R. Part 332. Nevertheless, the fact

that applicants who are currently on the ALJ register might be disadvantaged by the prior referral of applicants who were previously denied consideration is merely an unavoidable consequence required to provide a remedy for the substantial harm caused by OPM's application of an invalid employment practice.

¶ 59 OPM also argues that the extension of priority consideration through a new ALJ examination will effectively stifle competition and create a closed examination in which only a select few individuals will receive consideration for appointments. PFR File, Tab 26 at 25. While the relief order and the small number of expected ALJ vacancies in the foreseeable future might very well mean that a number of qualified, eligible candidates might not be considered for these vacancies, we also recognize that many of the class members who were denied consideration might have already been appointed to ALJ positions if it were not for the application of the 1996 scoring formula. A comparatively small number of expected ALJ vacancies in the near future may mean that a number of the appellants who otherwise would have been appointed several years ago may never be appointed to an ALJ position. However, to the extent that the CALJ addressed the appellants' rights in the event that OPM develops a new ALJ examination and found that current eligibles would be required to pass a new examination in order to remain on the ALJ register, we find that this portion of the initial decision constituted a prohibited advisory opinion, and we therefore vacate it. *See* 5 C.F.R. § 1204(h); *McLaughlin v. Office of Personnel Management,* 62 M.S.P.R. 536, 554-55 (1994) (the Board cannot issue advisory opinions), *aff'd,* 47 F.3d 1181 (Fed. Cir. 1995) (Table).

¶ 60 Finally, it appears that certain applicants on the ALJ register were awarded priority consideration by court or administrative order before the CALJ issued his relief order in this case. The relief initial decision provided that OPM could give priority consideration to any such applicants before it gives priority consideration to class members in this case. We discern no error in the CALJ's ruling on this issue because it allows OPM to provide priority consideration to other applicants before it provides such consideration to those appellants entitled to priority consideration as a result of this appeal only if the other applicants were awarded priority consideration by a court or administrative order that preceded the determination that the appellants were entitled to such priority in this case.

ORDER

¶ 61 We ORDER OPM to reconstruct the ALJ register and all certificates of eligibles that were issued while the 1996 scoring formula was in effect based on the applicants' final test scores, computed in accordance with ¶ 55, *supra,* augmented by the appropriate number of veterans' preference points, and to determine, for each certificate, which class members would have been within reach for selection from each certificate. We also ORDER OPM to compile a list of the class members entitled to priority consideration, and to include on that list information concerning the number of times each member is entitled to receive such consideration, the geographic location or locations in which each is to be given that consideration, and, with respect to areas in which more than one candidate is entitled to priority consideration, the order in which the consideration is to be given. As noted above, the number of

priority considerations to which a particular class member is entitled is the same as the number of times the class member was denied consideration for a position due to the use of the 1996 scoring formula. OPM must complete these tasks within 90 calendar days from the date of this order, and it must provide copies of the list to the appellants and to each person on the list. At the appellants' request, it must meet with the appellants' representatives and explain how the list was created and make available for inspection and copying all documents and other information used to create the list.

¶ 62 We ORDER OPM to insure that each class member who is entitled to priority consideration is given such consideration by the agencies that employ ALJs until the number of priority considerations that member has received equals the number of positions for which the member was denied consideration, or until the member is offered an ALJ position, whichever occurs first. We also ORDER OPM to rescind and cancel all scores assigned under the 1996 scoring formula, to inform each candidate remaining on the ALJ register who was assigned such a score that the score has been rescinded and canceled, and to discontinue using any register constructed through the use of the 1996 formula.

¶ 63 We ORDER the appellants to serve a copy of this decision on the class members or otherwise insure that they have access to it.

¶ 64 This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANTS REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § 1201.202. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decisions on your appeal.

NOTICE TO THE APPELLANTS REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission

Office of Federal Operations

P.O. Box 19848

Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with

EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your

appeal. You must submit your request to the court at the following address:

United States Court of Appeals

for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed.Cir.1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, http://www.mspb.gov.

MARSHALL, Member, issues a concurring opinion.

FOR THE BOARD:

Robert E. Taylor,
Washington, D.C.

APPENDIX

The effect of the various scoring procedures may best be illustrated by the following table, where NP refers to an

applicant entitled to no preference, 5P refers to an applicant entitled to a 5-point preference, and 10P refers to an applicant entitled to a 10-point preference:

Sum of the weighted scores of the four parts of the ALJ examination	Final score under 5 C.F.R. § 930.203	Final score under 1993 scoring formula (Final score + 10.9 constant + veterans' preference points)	Final score under 1996 scoring formula ((Final score *.3) + 70 + veterans' preference points)
60	NP – 60 = Failure	NP – 70.9	NP – 88
	5 P – 60 = Failure	5P – 75.9	5P – 93
	10P – 60 = Failure	10P – 80.9	10P – 98
70	NP – 70	NP – 80.9	NP – 91
	5P – 75	5P – 85.9	5P – 96
	10P – 80	10P – 90.9	10P – 101
80	NP – 80	NP – 90.9	NP – 94
	5P – 85	5P – 95.9	5P – 99
	10P – 90	10P – 100.9	10P – 104
90	NP – 90	NP – 100.9	NP – 97
	5P – 95	5P – 105.9	5P – 102
	10P – 100	10P – 110.9	10P – 107
100	NP – 100	NP – 110.9	NP – 100
	5P – 105	5P – 115.9	5P – 105
	10P – 110	10P – 120.9	10P – 110

Under 5 C.F.R. § 930.203 and the 1993 scoring formula, a preference-eligible applicant would be listed on the register ahead of those non-preference eligible

applicants whose total weighted scores exceeded the preference-eligible applicant's total weighted score by the number of veterans' preference points to which the applicant was entitled. *See* 5 U.S.C. § 3313 ("The names of preference eligibles shall be entered ahead of others having the same rating."). For example, a 5-point preference eligible with a total weighted score of 80 would have an augmented rating of 85 under 5 C.F.R. § 930.203 and an augmented rating of 95.9 under the 1993 scoring formula (80 + 10.9 + 5 = 95.9). Thus, his final rating would be the same as a non-preference eligible applicant with a total weighted score of 85 under either formula (5 C.F.R. § 930.203: 85 test points = 85 final rating; 1993 formula: 85 test score + 10.9 constant = 95.9 final rating). Under the 1996 scoring formula, a 5-point preference eligible with a total weighted score of 80 would have an augmented rating of 99 ((80 * .3) + 70 + 5 = 99) and would be entered on the register ahead of any non-preference eligible applicant with a total weighted score of 96.6 or below ((96.6 test points * .3) + 70 = 98.98 final rating). A 10-point preference eligible applicant with a total weighted score of 70 would have an augmented rating of 101 under the 1996 formula ((70 * .3) + 70 +10 = 101) and would be entered on the register ahead of all non-preference eligible applicants. Thus, it is clear that implementation of the 1996 formula provided a significant advantage to preference eligible applicants as compared with the application of either the 1993 scoring formula or 5 C.F.R. § 930.203.

CONCURRING OPINION OF MEMBER SUSANNE T. MARSHALL

¶ 1 While I agree with the Opinion and Order's result and rationale, I write separately to express my great concern over a procedural issue that arose in this case. While the petition for review in this appeal was pending before the Board, two members of Congress directed unsolicited letters to then-Chairman Ben Erdreich, expressing their opinions on the merits of this appeal. The Office of the Clerk of the Board placed those letters into the official record, served the letters on the parties to this appeal, and provided the parties with an opportunity to respond to them.

¶ 2 These letters are troubling for several reasons. First, these submissions were not made in accordance with the Board's procedures. Our regulations provide a structured system for enabling interested persons or organizations to become parties to, or participants in, Board appeals at different stages of the proceedings, including entering at the petition for review stage of those appeals. 5 C.F.R. §§ 1201.22, 1201.25, 1201.34, 1201.114. Such parties, intervenors, or amici may participate in an appeal in accordance with the rules governing a hearing, and the submission of evidence and argument, including the requirement of serving submissions on all of the parties. 5 C.F.R. §§ 1201.26(b)(2), 1201.114(h). These procedure [sic] produce the record upon which the Board's decision must rest exclusively. 5 C.F.R. §§ 1201.54(e), 1201.58, 1201.114(i).

¶ 3 The Congressional letters at issue do not satisfy any of these requirements. Further, while those submissions may not have technically violated the Board's

prohibitions against ex parte communications, because the Congressmen do not meet the regulatory definition of an "interested party," these letters directed solely to our former Chairman concerning the merits of a pending appeal certainly challenge the spirit of the ex parte prohibition. 5 C.F.R. §§ 1201.101-1201.103.

¶ 4 More troubling, these letters raise the specter of impermissible political influence, that could undermine the perception of a full, fair, and impartial adjudication, which is the cornerstone of the employee rights we protect. *See Frampton v. Department of the Interior,* 811 F.2d 1486, 1489 (Fed. Cir. 1987). Congress created the Board as an independent quasi-judicial body with the responsibility of ensuring that all Federal agencies follow Federal merit systems practices. *See* 5 C.F.R. § 1200.1. To accomplish this mandate, Congress dictated that the Board be composed of three members, all appointed by the President, with the advice and consent of the Senate, and each serving an independent seven-year term. Congress further provided that not more than two of the Board members could be adherents of the same political party, and that a Board member could be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. 5 U.S.C. §§ 1201, 1202. Congress chose this structure to insulate the Board from political pressure and to avoid violations of the merit principles. S.Rep. No. 95-969, at 6-7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2728-29.

¶ 5 While the letters at issue were no doubt well-intended, they are capable of being viewed by some as creating the appearance of political pressure, thereby contravening Congressional intent. As a Board member, I have the responsibility of remaining independent of any such influence, or even the appearance of such influence,

and I decide every case only on the basis of the evidence and arguments of the parties, intervenors, and amici who have participated in a Board appeal in accordance with our regulations. I, therefore, write separately to expressly indicate that I did not consider the arguments raised in the letters from the two Congressmen that have been included in the appeal file, or any responses by the parties relative to those letters. Instead, I made my decision in this case based upon the facts, the arguments submitted by the parties, intervenors, and the amicus curiae, and the controlling legal authorities.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-3057, 02-3042

MURRAY M. MEEKER, F. WILLIAM ROGGEVEEN, JAY E. LEVINE, and WILLIAM S. COLWELL,

Petitioners,

and

KAY COLES JAMES,
Director, Office of Personnel Management,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

ANN S. AZDELL and DONALD B. FISHMAN,

Intervenors.

ORDER

(Filed July 3, 2003)

A petition for rehearing en banc having been filed by the INTERVENORS, and responses thereto having been invited by the court and filed by the PETITIONERS*, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having

been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on July 10, 2003.

FOR THE COURT,

/s/ Jan Horbaly (AVV)
Jan Horbaly
Clerk

Dated: July 3, 2003

cc: William F. Fox, Jr., Todd M. Hughes
Joyce G. Friedman, William L. Bransford
Barton Stichman, Karin Kizer

MEEKER V MSPB, 01-3057, 02-3042
(MSPB – DC300A970368-I-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

* The responses were filed by Kay Coles James, Director, Office of Personnel Management and Murray M. Meeker, F. William Roggeveen, Jay E. Levine, and William S. Colwell.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-3057, 02-3042

MURRAY M. MEEKER, F. WILLIAM ROGGEVEEN, JAY E. LEVINE, and WILLIAM S. COLWELL,

Petitioners,

and

KAY COLES JAMES,
Director, Office of Personnel Management,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

ANN S. AZDELL and DONALD B. FISHMAN,

Intervenors.

ORDER

(Filed July 3, 2003)

A petition for rehearing en banc having been filed by the RESPONDENT, and a response thereto having been invited by the court and filed by the PETITIONER, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on July 10, 2003.

FOR THE COURT,

/s/ Jan Horbaly (AV)
Jan Horbaly
Clerk

Dated: July 3, 2003

cc: William F. Fox, Jr., Todd M. Hughes
Joyce G. Friedman, William L. Bransford
Barton Stichman, Karin Kizer

MEEKER V MSPB, 01-3057, 02-3042
(MSPB – DC300A970368-I-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court of Appeals
for the Federal Circuit

01-3057, 02-3042

MURRAY M. MEEKER, F. WILLIAM ROGGEVEEN, JAY E. LEVINE, and WILLIAM S. COLWELL,

Petitioners,

and

KAY COLES JAMES,
Director, Office of Personnel Management,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

ANN S. AZDELL and DONALD B. FISHMAN,

Intervenors.

JUDGMENT

(Filed Jul. 23, 2003)

Petition for review of the Merit Systems Protection Board in DC300A970368-I-1, DC300A970369-I-1, DC300A970368-I-2, and DC300A970369-I-2.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

REVERSED.

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly/KL
Jan Horbaly, Clerk

DATED: FEB 20 2003

ISSUED AS AMANDATE [sic]: July 23, 2003

United States Court of Appeals
for the Federal Circuit

Corrected: July 24, 2003

01-3057, 02-3042

MURRAY M. MEEKER, F. WILLIAM ROGGEVEEN, JAY E. LEVINE, and WILLIAM S. COLWELL,

Petitioners,

and

KAY COLES JAMES,
Director, Office of Personnel Management,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

ANN S. AZDELL and DONALD B. FISHMAN,

Intervenors.

JUDGMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD

In CASE NO. DC300A970368-I-1, DC300A970369-I-1, DC300A970368-I-2, and DC300A970369-I-2.

This CAUSE HAVING BEEN HEARD AND CONSIDERED, IT IS

Ordered AND adjudged:

REVERSED.

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly/ES
JAN HORBALY, CLERK

DATED: FEB 20 2003

ISSUED AS A MANDATE: July 23, 2003

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right –

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the

decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless –

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision –

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment –

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

* * *

---

5 U.S.C. § 3309. Preference eligibles; examinations; additional points for

A preference eligible who receives a passing grade in an examination for entrance into the competitive service is entitled to additional points above his earned rating, as follows –

(1) a preference eligible under section 2108(3)(C)-(G) of this title – 10 points; and

(2) a preference eligible under section 2108(3)(A)-(B) of this title – 5 points.

---

5 C.F.R. § 300.101 Purpose.

The purpose of this subpart is to establish principles to govern, as nearly as is administratively feasible and practical, the employment practices of the Federal Government generally, and of individual agencies, that affect the recruitment, measurement, ranking, and selection of individuals for initial appointment and competitive promotion in the competitive service or in positions in the government of the District of Columbia required to be filled in the same manner that positions in the competitive service are filled. For the purpose of this subpart, the term "employment practices" includes the development and use of examinations, qualification standards, tests, and other measurement instruments.

---

5 C.F.R. § 300.102 Policy.

This subpart is directed to implementation of the policy that competitive employment practices:

(a) Be practical in character and as far as possible relate to matters that fairly test the relative capacity and fitness of candidates for the jobs to be filled;

(b) Result in selection from among the best qualified candidates;

(c) Be developed and used without discrimination because of race, color, religion, sex, age, national origin,

partisan political affiliation or other nonmerit grounds; and

(d) Insure to the candidate opportunity for appeal or administrative review, as appropriate.

---

5 C.F.R. § 300.103 Basic requirements.

(a) *Job analysis.* Each employment practice of the Federal Government generally, and of individual agencies, shall be based on a job analysis to identify:

(1) The basic duties and responsibilities;

(2) The knowledges, skills, and abilities required to perform the duties and responsibilities; and

(3) The factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or an occupation or group of occupations, having common characteristics.

(b) *Relevance.* (1) There shall be a rational relationship between performance in the position to be filled (or in the target position in the case of an entry position) and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed. A minimum educational requirement may not be established except as authorized under section 3308 of title 5, United States Code.

(2) In the case of an entry position the required relevance may be based upon the target position when –

(i) The entry position is a training position or the first of a progressive series of established training and

development positions leading to a target position at a higher level; and

(ii) New employees, within a reasonable period of time and in the great majority of cases, can expect to progress to a target position at a higher level.

(c) *Equal employment opportunity.* An employment practice shall not discriminate on the basis of race, color, religion, sex, age, national origin, partisan political affiliation, or other nonmerit factor. Employee selection procedures shall meet the standards established by the "Uniform Guidelines on Employee Selection Procedures" (1978), 43 FR 38290 (August 25, 1978).

---

5 C.F.R. § 300.104 Appeals, grievances and complaints.

(a) *Employment practices.* A candidate who believes that an employment practice which was applied to him or her by the Office of Personnel Management violates a basic requirement in § 300.103 is entitled to appeal to the Merit Systems Protection Board under the provisions of its regulations.

(b) *Examination ratings.* A candidate may file an appeal with the Office from his or her examination rating or the rejection of his or her application, except that, where the Office has delegated examining authority to an agency, the candidate should appeal directly to that agency. The appeal and supporting documents shall be filed with the agency office that determined the rating.

(c) *Complaints and grievances to an agency.* (1) A candidate may file a complaint with an agency when he believes that an employment practice which was applied to him and which is administered or required by the agency

discriminates against him on the basis of race, color, religion, sex, or national origin; or age, provided that at the time of the alleged discriminatory action the candidate was at least 40 years of age but less than 65 years of age. The complaint shall be filed and processed in accordance with subparts B and E of part 713 of this chapter.

(2) Except as provided in paragraph (c)(1) of this section, an employee may file a grievance with an agency when he or she believes that an employment practice which was applied to him or her and which is administered or required by the agency violates a basic requirement in § 300.103. The grievance shall be filed and processed under an agency grievance system, if applicable, or a negotiated grievance system as applicable.

---

5 C.F.R. § 5.1 Civil Service regulations.

The Director, Office of Personnel Management, shall promulgate and enforce regulations necessary to carry out the provisions of the Civil Service Act and the Veterans' Preference Act, as reenacted in title 5, United States Code, the Civil Service Rules, and all other statutes and Executive orders imposing responsibilities on the Office. The Director is authorized, whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regulation, to grant a variation from the strict letter of the regulation if such a variation is within the spirit of the regulations, and the efficiency of the Government and the integrity of the competitive service are protected and promoted. Whenever a variation is granted the Director shall note the official record to show:

(a) The particular practical difficulty or hardship involved, (b) what is permitted in place of what is required by regulations, (c) the circumstances which protect or promote the efficiency of the Government and the integrity of the competitive service, and (d) a statement limiting the application of the variation to the continuation of the conditions which gave rise to it. Like variations shall be granted whenever like conditions exist. All such decisions and information concerning variations noted in the official record shall be published promptly in a Federal Personnel Manual Letter or Bulletin and in the Director's next annual report.

RESPONDENT MERIT SYSTEMS PROTECTION BOARD'S PETITION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 01-3057, 02-3042

MURRAY M. MEEKER, F. WILLIAM ROGGEVEEN, JAY E. LEVINE, AND WILLIAM S. COLWELL,

Petitioners,

and

KAY COLES JAMES,
DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

ANN S. AZDELL and DONALD B. FISHMAN,

Intervenors.

PETITION FOR REHEARING IN BANC OF A DECISION OF THE MERIT SYSTEMS PROTECTION BOARD IN: DC300A970368-I-1, DC300A970369-I-1, DC300A970368-I-2, DC300A970369-I-2, DC300A970368-R-1, DC-300A970368-R-2, DC300A-970369-R-1 and DC300A970369-R-2.

JEFFREY A. GAUGER,
Reviewing Attorney

MARTHA B. SCHNEIDER
General Counsel

JOYCE G. FRIEDMAN
Attorney
Office of the General Counsel Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419-0002
(202) 653-6772 Ext. 1283

DATE: April 25, 2003

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STATEMENT OF COUNSEL

Based on my reasoned and studied professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court or the precedents of this Court:

United States v. Gregory, 534 U.S. 1, 122 S. Ct. 431 (2001).

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1987).

Lackhouse v. Merit Systems Protection Board, 773 F.2d 313 (Fed. Cir. 1985).

Handy v. U.S. Postal Service, 754 F.2d 335 (Fed. Cir. 1985).

Based on my reasoned and studied professional judgment, I believe this appeal requires answer to the following precedent-setting question of exceptional importance:

Whether the authority of the Merit Systems Protection Board (MSPB or Board) to reverse an agency's decision in its entirety as "not in accordance with law" under 5 U.S.C. § 7701(c)(2)(C) is a broad standard of review to include the review of laws that the employee or applicant for employment shows are intertwined with the appealable agency decision.

PETITION FOR REHEARING IN BANC FOR RESPONDENT MERIT SYSTEMS PROTECTION BOARD

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 01-3057, 02-3042

MURRAY M. MEEKER, F. WILLIAM ROGGEVEEN, JAY E. LEVINE, AND WILLIAM S. COLWELL,

Petitioners,

and

KAY COLES JAMES,
Director, Office of Personnel Management,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent,

and

ANN S. AZDELL and DONALD B. FISHMAN,

Intervenors.

PETITION FOR REHEARING IN BANC

POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL OF THE COURT

1. The panel misapprehended the plain words of 5 U.S.C. § 7701(c)(2)(C) and the intent of Congress that do not set any limits on the Board's standard of review authority to reverse an agency's decision "if the employee or applicant for employment shows that the decision [within the Board's jurisdiction] was not in accordance with law."

2. The panel erroneously held that the Board's authority to reverse an agency's action as "not in accordance with law" under 5 U.S.C. § 7701(c)(2)(C), was premised on a "jurisdictional theory." *Meeker v. Merit Systems Protection Board*, 319 F.3d 1368, 1374 (Fed. Cir. 2003). Rather, the statutory provision is part of the Board's standard of review over agency actions within the Board's jurisdiction. This review standard is invoked only after the employee or applicant meets his or her burden to establish the Board's jurisdiction over the agency action and shows that the agency action is unlawful in its entirety because, for example, it is contrary to a statute.

3. The panel decision conflicts with *Handy v. U.S. Postal Service*, 754 F.2d 335 (Fed. Cir. 1985), where the Court considered the statutory provisions of 5 U.S.C. § 7701(c) as standards for reviewing an appealable agency action or decision, rather than as a predicate for Board jurisdiction.

4. Contrary to the panel's finding, *Meeker*, 319 F.3d at 1374, n.1, *Lackhouse v. Merit Systems Protection Board*, 773 F.2d 313 (Fed. Cir. 1985), is on point with this case because *Lackhouse* held that the Board had the authority

to review whether the employment practice of the "rule of three" as specified by 5 C.F.R. § 332.405 was consistent with the Veterans Preference Act (VPA) and lawfully applied to the petitioner.

5. The panel decision erroneously failed to give deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1987), to the MSPB's interpretation of its standard of review in 5 U.S.C. § 7701(c), and overstepped its review authority of Board cases under *United States v. Gregory*, 534 U.S. 1 (2001).

ARGUMENT*

I. THE PANEL DECISION IS CONTRARY TO THE PLAIN LANGUAGE OF 5 U.S.C. § 7701(c) THAT SETS FORTH THE MSPB'S REVIEWING STANDARD FOR WHEN IT MAY SUSTAIN OR NOT SUSTAIN AGENCY DECISIONS WITHIN ITS JURISDICTION.

It is axiomatic that statutory construction begins with the language of the statute itself. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999); *Mudge v. United States*, 308 F.3d 1220, 1227 (Fed. Cir. 2002). Because "statutes must be construed in the light of their purpose," *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940), courts will determine Congress's intent in promulgating a statute by examining "the explicit statutory language and the

---

* A comprehensive statement of the facts of this case was set forth in the respondent's brief before the panel. A summary of the facts, including the case before the panel, is set forth in the intervenor's petition for rehearing en banc.

structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

The plain words of 5 U.S.C. § 7701 reveal that Congress's purpose was to set forth the appellate procedures, burdens of proof and standards of review in cases that are "appealable to the Board under any law, rule or regulation" by employees or applicants for employment. 5 U.S.C. § 7701(a). Specifically, Congress unambiguously prescribed the burdens of proof and standards of review for sustaining or not sustaining an agency's action or decision in 5 U.S.C. § 7701(c).

Under 5 U.S.C. § 7701(c)(1), the Board may sustain an agency decision that is supported by either substantial evidence, in the case of a performance-related action, or by a preponderance of the evidence in all other cases. However, even if the agency meets its burden of proving its case by substantial or preponderant evidence under § 7701(c)(1), the plain words of 5 U.S.C. § 7701(c)(2) make clear that the Board may still not sustain the agency action within its jurisdiction "if the employee or applicant for employment shows" the Board the following: (1) there was "harmful error in the application of the agency's procedures" (§ 7701(c)(2)(A)); (2) the decision was based on a prohibited personnel practice (§ 7701(c)(2)(B)); or (3) "the decision was not in accordance with law." (§ 7701(c)(2)(C)). Conspicuously absent from the language of § 7701(c)(2)(C) is any limitation on the Board's review authority to consider whether an agency decision or action within the Board's jurisdiction is contrary to a statute (i.e., "not in accordance with law"). Indeed, Congress could not have intended that agencies may effect appealable decisions that are contrary to laws, unchecked by reviewing bodies charged with sustaining or not sustaining those decisions.

Cf. United States v. Turkette, 452 U.S. 576, 580 (1981) (absurd results are to be avoided in statutory interpretation); *accord Caron v. United States*, 524 U.S. 308, 315 (1998) (rejecting a "strange" statutory interpretation that yielded results "contrary to a likely and rational, congressional policy"). We therefore respectfully submit that the panel holding,[1] which limits the review of statutes in employment practice cases to only those statutes that are tied to the jurisdictional elements of an employment practice case (i.e., the basic requirements of 5 C.F.R. § 300.103), is contrary to the language and the purpose of § 7701(c)(2)(C).

II. THE PANEL ERRED IN FINDING THAT THE BOARD'S AUTHORITY TO DETERMINE WHETHER THE OFFICE OF PERSONNEL MANAGEMENT'S (OPM'S) DECISION IS IN ACCORDANCE WITH LAW IS A JURISDICTIONAL THEORY RATHER THAN A PART OF THE BOARD'S STANDARD OF REVIEW OVER AGENCY DECISIONS THAT THE EMPLOYEE OR APPLICANT ESTABLISHES TO BE WITHIN THE BOARD'S JURISDICTION.

The *Meeker* panel found that the Board properly exercised jurisdiction under 5 C.F.R. § 300.104(a) to address the Azdell class's challenge to the 1996 scoring

[1] The panel cited to no laws, regulations, or cases that support its finding that once the Board properly exercises its jurisdiction over an OPM employment practice, it cannot review a law that the applicants for employment show is tied to and violated by the employment practice – thereby rendering the employment practice to be "not in accordance with law."

formula as an employment practice that did not meet the basic requirements of § 300.103. However, the panel denied the Board's authority to review the Azdell class's argument that the employment practice was not in accordance with law under 5 U.S.C. § 7701(c)(2)(C) because it was inconsistent with the VPA. This latter finding was erroneous.

The Azdell class initially raised this argument as an affirmative defense to OPM's argument that it did not violate its employment practice regulations under 5 C.F.R. § Part 300A because the new scoring formula *"was required* by the Veterans Preference Act." *See* Merits Initial Decision, *Azdell v. Office of Personnel Management*, MSPB Docket Nos. DC-300A-97-0368-I-1, DC-300A-97-0369-I-1 at 17 (April 22, 1999) [Respondent's Appendix to Panel at 59].[2] Thus, because OPM intertwined its employment practice of the scoring formula with the requirements of the VPA, the Azdell class was within its rights, under 5 U.S.C. § 7701(c)(2), to argue the affirmative defense that the 1996 scoring formula was not in accordance with the VPA [codified as 5 U.S.C. § 3309] as urged by OPM. *See* 5 C.F.R. § 1201.56(b)(3).[3]

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[2] OPM reiterated this argument to the panel. *See* OPM Brief at 13-16.

[3] Section 1201.56(b)(3) states:

> *Affirmative defenses of the appellant.* Under 5 U.S.C. § 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard stated in paragraph (a) of this section, if the appellant: (3) Shows that the decision was not in accordance with law.

The panel disagreed with the Board's finding that it was required to consider whether OPM acted in accordance with law once the Board took jurisdiction over the OPM employment practice at issue. The panel found that "[t]he Board does not have general jurisdiction to entertain any statutory challenge to an employment practice" and that the Board's review of the VPA was an incorrect "jurisdictional theory." *Meeker*, 319 F.3d at 1374. The panel then held that the OPM regulation granting the Board jurisdiction to review employment practices confines "all legal challenges to employment practices" to the three grounds set forth in 5 C.F.R. § 300.103 [basic requirements for employment practices]." *Id.*

The panel was correct to find that 5 C.F.R. § 300.104(a) grants the Board jurisdiction over an employment practice and that, pursuant to that regulation, the candidate must show a belief that an OPM employment practice violates a basic requirement in § 300.103 for Board jurisdiction to attach. However, the panel erred in its treatment of 5 U.S.C. § 7701(c)(2)(C) as an additional jurisdictional theory to challenge an employment practice already established to be in the Board's jurisdiction.

As previously stated, § 7701(c) has never been treated by the Board as a jurisdictional grant; rather, it is the Board's standard of review set forth by Congress.[4] For the

[4] *See, e.g., Hipona v. Department of the Army*, 39 M.S.P.R. 522, 525 (1989) (§ 7701(c)(2)(C) is the statutory provision which authorizes the MSPB to overturn agency actions within its jurisdiction if they are "not in accordance with law;" it does not provide the Board with jurisdiction over all actions that are alleged to be incorrect; first a statute or regulation must provide the Board with jurisdiction to review an agency's decision).

Court to allow the panel's treatment of § 7701(c) to stand would severely limit the Board's review authority over agency decisions established to be within its jurisdiction. Further, the statutory challenge to the 1996 formula was not "any statutory challenge," but was directed to the VPA, which was inextricably connected to the scoring formula by virtue of the fact that OPM argued that the formula was mandated by the requirements of the VPA.

The panel's opinion so limiting the Board's authority to review employees or applicants claims under § 7701(c)(2)(C) creates an intracircuit conflict with *Handy v. U.S. Postal Service*, 754 F.2d at 335, where the Court considered the statutory provisions of 5 U.S.C. § 7701(c) as standards for reviewing an appealable agency decision, rather than as a predicate for Board jurisdiction. In *Handy*, the Court addressed the difference between the Board's review authority under section 7701(c)(2)(A) and its review authority under section 7701(c)(2)(C). The Court agreed with the Board's analysis of these sections in *Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 119-120 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir.), *cert. denied sub nom. Schapansky v. Department of Transportation*, 469 U.S. 1018 (1984), as standards of review in which paragraph (A) ("harmful error") was confined to all procedural errors and paragraph (C) ("not in accordance with law") was applicable to other unlawful actions. *Handy*, 754 F.2d at 337. The Court added, however, that paragraph (C) "is directed to the decision itself. *Was the decision in its*

entirety in accordance with law? Id. at 337-38 (emphasis in original).[5]

The Board has consistently followed *Handy*'s interpretation that an agency action is "not in accordance with law" if it is unlawful in its entirety, i.e., if there is no legal authority for the action. *See Stephen v. Department of the Air Force*, 47 M.S.P.R. 672, 683-84 (1991) (citing *Handy*, 754 F.2d at 337-38). Particularly analogous to this case is *Cuellar v. U.S. Postal Service*, 8 M.S.P.R. 624, 629, 632 (1981), in which the Board held that an OPM regulation (5 C.F.R. § 752.404(d)(3)) allowing for an emergency suspension during the 30-day notice period of a removal was contrary to statute (5 U.S.C. § 7513(b)) that mandated the 30-day notice period, excluding only the "crime exception." Because there was no legal authority for OPM to effect an employment practice that is contrary to statute, the Board properly found that the employment practice "in its entirety" was "not in accordance with law."[6] *Handy*, 754 F.2d at 337-38. Therefore, the panel's holding, which

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[5] The Court specifically referred to § 7703(c) as a "standard of review" in its conclusion that there was no basis for reversal under § 7703(c). *Id.* at 338.

[6] Other examples where the Board followed the analysis in *Handy* and *Stephen* include: *Morgan v. U.S. Postal Service*, 82 M.S.P.R. 1, 4 (1999) (an agency's action against an employee because of the employee's military service is contrary to statute (38 U.S.C. § 4311), is therefore without legal authority, and may not be sustained as "not in accordance with law."); *Hamilton v. U.S. Postal Service*, 58 M.S.P.R. 486, 488-89 (1993) (adverse action was "not in accordance with law" where decision letter was signed by a deciding official after that official retired); *Clark v. U.S. Postal Service*, 52 M.S.P.R. 634, 639-40 (1992) (taking two disciplinary actions on the same grounds was "not in accordance with law").

treated § 7701(c)(2)(C) as a "jurisdictional theory" rather than as a standard for reviewing an agency decision established to be within the Board's jurisdiction, is contrary to the Court's previous holding in *Handy* and to the Board's consistent interpretation of that section.

III. DESPITE THE PANEL'S ATTEMPT TO DISTINGUISH LACKHOUSE, THAT DECISION IS ON POINT WITH THIS CASE AND THE PANEL'S DECISION CREATES AN INTRACIRCUIT CONFLICT IN THIS REGARD.

Although the panel found otherwise, the *Meeker* decision is contrary to *Lackhouse v. Merit Systems Protection Board*, 733 F.2d 313 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1049 (1986). *See Meeker*, 319 F.3d at 1374 n. 1.[7] In *Lackhouse*, the petitioner appealed to the MSPB asserting that "the so-called 'rule of three' which IRS applied to him pursuant to the explicit OPM regulation was invalid because [it is] in conflict with the Veterans' Preference Act." *Lackhouse*, 773 F.2d at 315. While the panel was correct in stating that the Board's decision in *Lackhouse* concerned whether OPM or the employing agency was

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[7] The court stated:

> In [*Lackhouse*] the court rejected the argument that the Board lacked jurisdiction to address a claim that a particular OPM regulation was inconsistent with the Veterans' Preference Act. The question presented to the court was which entity was applying the relevant employment practice, OPM or the IRS, the employing agency. The court did not address the scope of the Board's jurisdiction over claims that an OPM regulation is incompatible with the Veterans' Preference Act. The *Lackhouse* case therefore has no precedential force with respect to that jurisdictional issue.

applying an OPM regulation, the Court did not stop there. The Court went on to explore whether the employment practice embodied in the "rule of three" regulation, 5 C.F.R. § 332.405, was consistent with the Civil Service Reform Act and the Veterans' Preference Act. The Court stated:

> It follows that the MSPB presiding official erred in saying that the Board lacked jurisdiction over the question of the validity of the "rule of three" (5 C.F.R. § 332.405) *as applied to veteran preference eligibles*. MSPB did have that precise authority. [Emphasis supplied].

Lackhouse, 773 F.2d at 315. The Court then addressed the petitioner's claim that OPM's application of its regulation to him (as a preference eligible) was inconsistent with the VPA. In sustaining the agency's action, the Court found:

> [T]hough the Board did have jurisdiction, Lackhouse has no remediable claim because the "rule of three" was validly adopted under the Civil Service Reform Act and preexisting legislation, clearly survived the Veterans' Preference Act, and was lawfully applied to petitioner.

Id. at 316. The Court then held:

> We have to conclude, therefore, that 5 C.F.R. § 332.405 – the current "rule of three" – is lawful and was rightly applied to petitioner Lackhouse. The end-result is that we reverse the Board's holding that it lacked jurisdiction over Lackhouse's appeal but we need not remand because the only issue we find within the MSPB jurisdiction is purely legal and the presiding official discussed and correctly decided that very issue (though he erroneously thought he had no

> jurisdiction to do so). As to that aspect of the MSPB decision, we affirm.

Id. at 317. Thus, despite the *Meeker* panel's assertion to the contrary, *Lackhouse* is directly on point with the Board's authority to review an employee's claim that OPM's application of its employment practice is not in accordance with laws such as the VPA if the employment practice already within the Board's jurisdiction involves that law. The fact that the Court did the very same kind of analysis in *Lackhouse* as the Board did in its *Azdell* decisions makes the *Meeker* decision inconsistent with precedent and ripe for Federal Circuit en banc review.

IV. THE PANEL ERRED IN GIVING NO DEFERENCE TO THE BOARD'S CONSISTENT INTERPRETATION OF § 7701(c)(2)(C) AND OVERSTEPPED ITS REVIEW AUTHORITY OF BOARD CASES BY LIMITING THE MSPB'S REVIEW AUTHORITY OF AGENCY DECISIONS WITHIN ITS JURISDICTION.

It is well established that deference should be accorded to an agency's construction of a statutory scheme it is entrusted to administer. *See Chevron*, 467 U.S. at 843-44. As discussed previously, the Board has consistently considered the unambiguous language of § 7701(c)(2)(C) to be a standard of review of cases within its jurisdiction. The panel erred in failing to give *Chevron* deference to the Board's interpretation when it failed to permit the Board's review of Azdell's affirmative defense that the employment practice was "not in accordance with law [the VPA]."

As in *Gregory*, the Federal Circuit overstepped its statutory review of the substance of Board decisions by limiting the MSPB's "wide latitude in fulfilling its

obligation to review agency [decisions]" within its jurisdiction. *Gregory*, 534 U. S. at 7. Just as the Supreme Court in *Gregory* found no basis for the Federal Circuit to limit the Board's authority to independently evaluate prior disciplinary actions that were the subject of pending grievances, the *Meeker* panel did not cite to any provision of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (CSRA), or any other statute to justify its new rule that the Board may not review a statute in an employment practice case (and by implication in other cases within the Board's jurisdiction) unless the statute is tied to the elements of the jurisdictional predicate for the action (i.e., the basic requirements of 5 C.F.R. § 300.103). Thus, we respectfully submit that, as in *Gregory*, the panel overstepped its standard of review by limiting the Board's review authority and reversing a Board decision that was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" or unsupported by substantial evidence. 5 U.S.C. § 7703(c).

CONCLUSION

For the reasons set forth above, the MSPB respectfully requests that this Court grant the MSPB's petition for rehearing en banc.

Respectfully submitted,

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DATE: 4/25/03

(2)

Supreme Court, U.S.
FILED
NOV 26 2003
OFFICE OF THE CLERK

No. 03-624

IN THE

SUPREME COURT OF THE UNITED STATES

ANN S. AZDELL and DONALD B. FISHMAN,

Petitioners,

v.

KAY COLES JAMES, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit erred in confirming the authority of the director of the jurisdictional agency, the Office of Personnel Management ("OPM") to exercise its discretion to grant a "variation" from certain OPM practices involved with the commissioning and appointment of federal administrative law judges.

PARTIES TO THE PROCEEDING

Petitioners have been described in the petition for a writ of certiorari. The respondents filing the instant opposition are Murray M. Meeker, the Estate of F. William Roggeveen, Jay E. Levine, and William S. Colwell. Mr. Roggeveen died while this matter was pending at the Federal Circuit. Each of the named respondents is an attorney, an applicant for appointment as federal administrative law judge and a military service veteran entitled to the application of certain veterans' preference points in the federal employment process. These same respondents were identified as petitioners in the action before the Federal Circuit. The other respondent in this action is Kay Coles James, Director, the Office of Personnel Management.

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

The Office of Personnel Management ("OPM") is the jurisdictional agency charged by statute with developing criteria and conducting competitive examinations for federal administrative law judges ("ALJs"). In 1993, OPM promulgated an examination scoring formula that established a minimum passing score of 70 (based on a range from 0 to 100). In addition, OPM added 10.9 points to each candidate's score so that the lowest weight score was raised to a score of 70. At that point, veterans preference points – a statutory entitlement authorized by the Veterans' Preference Act, 5 U.S.C. §3309 – were added to the scores of eligible veteran-applicants.

In 1996, in response to an investigation by the OPM Inspector General, certain portions of the examination were rescored. Unfortunately, that rescoring caused a sharp escalation of the failure rate. To deal effectively and efficiently with this failure rate, OPM modified the scoring formula so that all applicants who could show the requisite lawyering experience and who completed the rest of the examination were given a base score of 70. Applicants were then given a weighted score based on a range of 0 to 30 points. After the weighted score was added to the 70-point base score, additional veterans' preference points were added for eligible veteran-applicants. Because the 1996 formula differed from the 1993 formula, the Director of OPM granted a "variation" under 5 C.F.R. §5.1. Section 5.1 provides in relevant part:

> The Director, Office of Personnel Management, shall promulgate and enforce regulations necessary

> to carry out the provisions of the Civil Service Act and the Veterans' Preference Act. . . . The Director is authorixed, whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regulation, to grant a variation from the strict letter of the regulation if such a variation is within the spirit of the regulations and the efficiency of the Government and the integrity of the competitive service are protected and promoted.

In 1997, a class action challenging the OPM actions was filed by nonveteran applicants (the "Azdell class") in the Merit Systems Protection Board ("MSPB" or the "Board"). The Board notified the class members of the pendency of the proceeding although it did not notify the veteran-applicants. The Board's Chief Administrative Law Judge conducted a bifurcated evidentiary hearing on which he first found for the Azdell class on the merits and then fashioned a remedy. The four veteran-applicants (Meeker, Roggeveen, Levine and Colwell), respondents here, intervened before the Board after the proceeding on the merits was concluded. With certain minor adjustments, the full Board affirmed the Chief ALJ's decision. Respondents Meeker, Roggeveen, Levine and Colwell along with OPM filed a petition for judicial review in the United States Court of Appeals for the Federal Circuit.

On February 20, 2003 a three-judge panel of the Circuit reversed the Board and vacated the Board's remedial order. *Meeker v. MSPB,* 319 F.3d 1368 (Fed. Cir. 2003) (hereafter "*Meeker*") (The full text of the opinion is set out in the petition for writ of certiorari). On July 23, 2003, the Circuit denied two petitions for rehearing including a petition for rehearing *en banc.*

On the merits of this case. the Federal Circuit determined with elegant simplicity that the Merit Systems Pro-

tection Board "erred when it asserted jurisdiction to address the claim that the 1996 scoring formula violated the Veterans' Preference Act, because the Board does not have general, free-standing jurisdiction to address claims that an OPM employment practice is not in accordance with law." *Id.* at 1376. In so holding, the Circuit rejected arguments by the Azdell class and the Board to the contrary and concluded that the 1996 scoring formula was properly applied by OPM because the Director of OPM had granted a valid variation. The variation, as the Circuit held, "was broad enough to waive strict compliance with the requirements of 5 C.F.R. Part 300." *Id.*

REASONS FOR DENYING THE PETITION

I.

THE VARIATION GRANTED BY THE DIRECTOR OF OPM IS FULLY CONSISTENT WITH THE LANGUAGE OF 5 C.F.R. §5.1.

Federal administrative agencies have long recognized that there are instances in which the specific terms or the express language of an agency rule must be modified or excepted from in order to avoid doing a greater violence to the fundamental purposes of the regulatory scheme. For example, the Department of Energy grants "exceptions" which constitute the "waiver or modification of the requirements of a regulation, ruling or generally applicable requirement under a specific set of facts." 10 C.F.R. §205.2. The Department of Commerce may grant an "adjustment" or "exception" when "a . . . regulation or official action results in an undue or exceptional hardship . . . or the consequence of following a provision of this regulation or an official action is contrary to the intent of [various statutes]." 15 C.F.R. §700.80.

OPM is permitted, under 5 C.F.R. §5.1 to grant a variation "whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regulation . . . if such variation is within the spirit of the regulations and the efficiency of the Government and the integrity of the competitive service are protected and promoted." Section 5.1 also sets out a process for issuing the variation that requires the Director to note on the official record (a) the practical difficulty or hardship involved; (b) the permitted practice that will substitute for a regulatory requirement; (c) a statement of circumstances that promote efficiency and preserve integrity; and (d) a statement of limitation of the variation." As the Federal Circuit correctly noted, the Director of OPM issued the variation and complied with the procedural requirements for issuing the variation. 319 F.3d at 1376.

The variation was clearly necessary because of the enormous failure rate generated by the 1993 formula and the other problems and inconsistencies in the ALJ application scheme. Recognizing that a variation may be reviewable for abuse of discretion, the Federal Circuit concluded that there was no such abuse in this case. *Id.* at 1379.

II.

THE FEDERAL CIRCUIT CORRECTLY HELD THAT MSPB DOES NOT HAVE UNFETTERED JURISDICTION TO REVIEW ANY AND ALL OPM DETERMINATIONS.

The Federal Circuit held squarely that the MPSB "does not have general jurisdiction to entertain any statutory challenge to an employment practice. Rather, the Board's jurisdiction [is limited to] challenges based on the three grounds set forth in 5 C.F.R. §300.103." 319 F.3d at 1375. The Director of OPM – having issued a valid variation – removed this entire case from the scope

of § 300.103 because the variation authorized a departure from the strict language of § 300.103.

Petitioners argue that this holding contravenes this Court's decision in *Lackhouse v. MPSB*, 773 F.3d 313 (Fed. Cir. 1985). Petition at 27. First, the Federal Circuit cited and directly addressed *Lackhouse* to conclude that the question presented in that case was essentially which federal agency, OPM or the Internal Revenue Service, was applying and interpreting the so-called "Rule of Three." 319 F.3d at 1375 n.1. Second, *Lackhouse* is further distinguished from the instant case in that there was no relevant variation applicable to the proceeding as there is in the instant case. Contrary to the assertions of the Petitioners, it is the existence of the *variation* that deprives MSPB of jurisdiction here.

III.
THE FEDERAL CIRCUIT PROPERLY DEFERRED TO THE DETERMINATIONS MADE BY OPM, NOT THE CONCLUSIONS REACHED BY MSPB.

Applying, *sub silentio*, the long-settled doctrine of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1987), the Federal Circuit properly deferred to the determinations of the jurisdictional agency, OPM, and not to the MSPB. This deference reflects the fact that OPM is the federal administrative agency charged with developing and implementing a program and policies for commissioning federal ALJs. In emphasizing the legitimacy of the Director's variation, the Federal Circuit noted all of the complications and subtleties that go into a proper implementation of these policies. OPM was responding to an urgent, felt need to appoint additional ALJs and was exercising the broad discretion enjoyed by the Director under the authority to issue variations conferred by 5 C.F.R. 5.1. OPM is the

policy-making body to which a reviewing court must defer. The decision by MSPB does not require *Chevron* deference. *See, e.g., Martin v. Occupational Safety & Health Rev. Comm,* 499 U.S. 144 (1991).

The Petitioners repeatedly cite this Court's decision in *United States Postal Service v. Gregory,* 534 U.S. 1 (2001). A close look at *Gregory* shows that the case is inapposite to the issues presented in the instant case. Maria Gregory was not a stellar employee. The Postal Service initiated three disciplinary actions against her, which actions were pending when she incurred a fourth violation that resulted in her termination from Postal Service employment. An ALJ at the MSPB conducted an evidentiary hearing in which the ALJ made an independent evaluation of the first three disciplinary actions.

This Court concluded that the ALJ had the authority to make that independent review and that the Federal Circuit's review of the ALJ's findings was reviewable only under the arbitrary, capricious standard. However, when closely examined, *Gregory* simply confirms an entirely different proposition of federal administrative law. The Board's ALJ was deciding questions of fact, not questions of law. Factual determinations made in the context of an evidentiary proceeding are subject to arbitrary/capricious/substantial evidence review. Applying that standard, a reviewing court is understandably circumscribed in its ability to overturn the findings of fact made by the person who has presided over the taking of the evidence. *See, e.g., Universal Camera Corp. v. NLRB,* 340 U.S. 474, 479 (1951); *Morgan v. United States,* 298 U.S. 468, 479 (1936).

This is not what the Federal Circuit addressed in the instant case. Here, the Federal Circuit reviewed the

authority of the Director of OPM to issue a variation and concluded that such authority was not reviewable by MSPB under the narrow jurisdictional provisions that establish the Board's authority to examine OPM determinations. This is a question of law to which the Federal Circuit owed no deference to the Board. *Chevron* and *Martin* govern the instant action. As such, the Federal Circuit is certainly not bound by the arbitrary/capricious standard set out in *Gregory*. *Meeker* is apples. *Gregory* is oranges.

IV.
THE PETITIONERS CANNOT SHOW THAT THE OPM VARIATION WAS NOT IN ACCORDANCE WITH LAW. THEREFORE, THE BOARD LACKED JURISDICTION TO REVIEW THIS ISSUE.

The Federal Circuit acknowledged that §7701(c)(2) permits the Board to conduct "not in accordance with law" review "but only with respect to agency decisions that are within the Board's jurisdiction." 319 F.3d at 1375. The Circuit then observed that the Board has jurisdiction to conduct "not in accordance with law" review only "with respect to challenges based on the three grounds set forth in 5 C.F.R. §300.103" – *i.e.*, (a) job description, (b) rational relationship, (c) non-merit factor. As the Circuit correctly noted, the granting of the variation by the Director of OPM is not within these three categories. As a result, the Board may not perform a "not in accordance with law" review of the OPM action. The variation is neither a job description, an issue of rational relationship, nor a non-merit factor.

Petitioners cite this Court's decision in *United States v. Fausto*, 484 U.S. 439 (1988) for the totally unsupported proposition that it is the MSPB that makes federal personnel policy. That is not *Fausto*. This Court's

decision in *Fausto* talks about MSPB providing a unifying role in the disposition of federal personnel disciplinary proceedings only in the context of the historical background. Prior to establishing the MSPB, federal personnel actions could be taken to the various federal district courts for adjudication. Decisions by the federal district courts were highly inconsistent and non-uniform. The MSPB could provide both consistency and uniformity.

Moreover, Petitioners choose to disregard the equally compelling pronouncement of this Court in *Fausto*: that the Federal Circuit has "primacy" for judicial review. *Id.* at 449. Much like *Gregory*, *Fausto* is simply inapposite in the instant action.

V.

THE RECORD BELOW IS TOTALLY DEVOID OF ANY EVIDENCE RELATING THE DECISION BELOW TO THE QUALITY OF FEDERAL ADMINISTRATIVE LAW JUDGES.

Petitioners conclude their pleading with a wholly unsupported statement that the decision under review in this Court, if allowed to stand, will "result in the appointment of lesser qualified administrative law judges to adjudicate important federal programs and benefits." First, there is not one iota of support in the record below for this proposition. Each of the applicants for appointment as ALJ went through a substantial screening and evaluative process before any veterans' preference points were added to any individual application. Each was deemed qualified based on OPM's various screening and evaluative techniques. That certain individuals are subsequently elevated on the list of eligibles higher than others because of the application of the statutory veterans' preference

points has absolutely nothing to do with the qualifications or the abilities of the person ultimately appointed to the position.

CONCLUSION

For the reasons stated, this Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

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November 26, 2003

Supreme Court, U.S.
FILED
JAN 28 2004
OFFICE OF THE CLERK

(3)

No. 03-624

In the Supreme Court of the United States

ANN S. AZDELL AND DONALD B. FISHMAN,
PETITIONERS

v.

KAY COLES JAMES, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board lacks jurisdiction to consider whether an award of statutory veterans' preference points by the Office of Personnel Management (OPM) in connection with OPM's ranking of administrative law judge candidates violates the Veterans' Preference Act, 5 U.S.C. 3309.

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In the Supreme Court of the United States

No. 03-624

ANN S. AZDELL AND DONALD B. FISHMAN, PETITIONERS

v.

KAY COLES JAMES, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 319 F.3d 1368. The opinions of the Merit Systems Protection Board (Pet. App. 28a-63a, 64a-129a) are reported at 87 M.S.P.R. 133 and 89 M.S.P.R. 88.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2003. Two petitions for rehearing were denied on July 3, 2003. Pet. App. 130a-131a, 132a-133a. On September 23, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 22, 2003, and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 5 U.S.C. 7701, 3309 and 5 C.F.R. 300.101-300.104 are set forth at Pet. App. 138a-145a.

STATEMENT

1. Pursuant to its statutory authority to conduct competitive examinations for administrative law judge (ALJ) positions, 5 U.S.C. 1104, 1302, the Office of Personnel Management (OPM) developed the examination procedure found at 5 C.F.R. 930.203. Pet. App. 3a. This regulation requires that all ALJ applicants must first meet the minimum qualifications described in OPM Examination Announcement No. 318 with regard to the applicant's experience as an attorney in terms of the number of years the applicant has practiced, the area of specialization, and level of responsibility. 5 C.F.R. 930.203(b); Pet. App. 67a-68a. Applicants who satisfy these minimum qualifications are then ranked based upon their scores in four additional categories. 5 C.F.R. 930.203(c) and (d). A total weighted score of 70 on a 100-point scale is required to pass. 5 C.F.R. 930.203(e). Pursuant to the Veterans' Preference Act of 1994 (VPA), veterans' preference points are then awarded, as appropriate, after the applicants' test scores have been totaled into a combined weighted score, 5 C.F.R. 930.203(e), with ten and five points added to the scores of eligible veterans and other specified persons. 5 U.S.C. 3309(1) and (2); Pet. App. 4a, 69a.

Between October 1993 and June 1996, OPM's scoring formula (1993 formula) required that all applicants who complete the examination receive a total weighted

score of at least 70. Pet. App. 3a, 70a. But because the scores on the test did not result in all of the candidates achieving final ratings between 70 and 100, as provided for in the examination announcement, a fixed 10.9 points was added to the total weighted scores of each candidate to bring the lowest weighted score up to 70. *Id.* at 3a, 70a-71a.

In 1996, portions of the ALJ examination were rescored due to an investigation by OPM's inspector general. Pet. App. 4a, 71a. This rescoring resulted in the final weighted scores of all applicants ranging from 55 to 92, with approximately eighty percent of all applicants failing to achieve a passing score of 70. *Id.* at 4a, 72a.

After the 1996 rescoring, OPM determined it was not administratively feasible to apply the 1993 formula because the addition of a constant 10.9 points would give the top applicant a score of over 100 and still leave the bottom applicant below 70. Pet. App. 72a. OPM thus modified its scoring formula in 1996 (1996 formula), such that all applicants who satisfied the minimum employment qualifications and completed the competitive portions of the exam received a base score of 70, with the total weighted score of the four-part test, after being multiplied by a factor of .3, accounting for an additional possible 30 points. *Id.* at 4a, 76a. Again, veterans' preference points were then added, where applicable, to the total combined score. *Id.* at 5a, 76a.

Because the 1996 formula differed from that contained in the ALJ regulation, 5 C.F.R. 930.203, OPM obtained a variation pursuant to 5 C.F.R. 5.1. Pet. App. 5a, 73a-75a. This regulation allows the Director of OPM to grant a variation from a regulation "whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regu-

lation," so long as the variation is "within the spirit of the regulations" and "the efficiency of the Government and the integrity of the competitive service are protected and promoted." 5 C.F.R. 5.1. The Director found the variation from 5 C.F.R. 930.203 was appropriate "to avoid the practical difficulty required to revise the final ratings of the more than 1700 candidates on the ALJ register." Pet. App. 17a, 75a. The Director also concluded that the variation was consistent with OPM's practices in other similar competitive examinations and, therefore, promoted merit principles. *Id.* at 19a.

2. Petitioners represent a class of non-veteran, non-preference eligible ALJ candidates whose scores were affected by the rescoring under the 1996 formula. Pet. App. 80a. Believing the 1996 formula violated various regulations and Federal statutes, petitioners filed an appeal with the Merit Systems Protection Board (MSPB or board), premising jurisdiction upon a regulation, 5 C.F.R. 300.104, which authorizes an appeal to the MSPB by a candidate for a Federal civil service position who believes that an "employment practice" applied to him or her by OPM violates a "basic requirement" of 5 C.F.R. 300.103. 5 C.F.R. 300.104(a); Pet. App. 7a, 80a-81a, 97a-98a. An "employment practice" is defined to include "the development and use of examinations, qualification standards, tests, and other measurement instruments." 5 C.F.R. 300.101. Section 300.103, in turn, requires that any "employment practice" of the Government satisfy the three "basic requirements" of being based on a professionally prepared job analysis, rationally related to the duties of the position, and nondiscriminatory. 5 C.F.R. 300.103(a), (b) and (c).

In their appeal to the MSPB, petitioners alleged OPM's 1996 formula was an employment practice that violated the basic requirements of 5 C.F.R. 300.103 and had the effect of increasing the relative weight of veterans' preference points, in violation of the VPA. Pet. App. 5a-6a, 32a, 80a, 89a-90a. In response, OPM argued that the MSPB lacked jurisdiction to entertain the appeal because its implementation of the VPA is not an "employment practice" for purposes of 5 C.F.R. 300.104 and that the variation OPM had obtained precluded the board from reviewing whether the 1996 formula complied with the basic requirements of Section 300.103. Pet. App. 37a-38a, 40a, 92a, 98a.

The MSPB rejected both of these arguments. It found that, although the "statutorily required addition of veterans' preference points to the earned ratings of competitive service applicants is not an employment practice *per se*," the "process embodied in the 1996 scoring formula" is an "employment practice" under 5 C.F.R. 300.101 over which it possessed jurisdiction. Pet. App. 94a-95a. Having determined it possessed jurisdiction to consider an OPM employment practice, the board stated it was required, pursuant to 5 U.S.C. 7701(c)(2)(C), "to consider whether OPM acted in accordance with law"—*i.e.*, whether the 1996 formula violates the VPA. Pet. App. 40a. On the merits, the MSPB ruled the 1996 formula violated the first two basic requirements set forth at 5 C.F.R. 300.103(a) and (b), and violated the VPA. Pet. App. 6a-7a, 89a- 90a.

3. The Federal Circuit reversed. It held first that, although the MSPB possessed jurisdiction to determine whether the 1996 formula complied with the basic requirements of 5 C.F.R. 300.103, it did not have jurisdiction to consider whether the formula violated the VPA. Pet. App. 7a-14a. To arrive at this conclusion,

the court of appeals began by reasoning that scoring an applicant's examination, on the one hand, and awarding preference points, on the other hand, are "separate steps in the process of calculating the final scores." *Id.* at 8a. Therefore, the petitioners' challenge to the 1996 formula based upon asserted violations of 5 C.F.R. 300.103 is "legally distinct" from their challenge based upon the VPA. Pet. App. 8a-9a.

The court then determined that the 1996 formula is an "employment practice" for purposes of 5 C.F.R. 300.101. Pet. App. 9a. Because the petitioners' challenge to the 1996 formula involved, "at least in part," an allegation that the formula did not satisfy the basic requirements of 5 C.F.R. 300.103, the Federal Circuit found the MSPB had jurisdiction to entertain that aspect of the petitioners' appeal. Pet. App. 10a-11a.

At the same time, however, the court held the MSPB lacked jurisdiction to determine whether the 1996 formula violated the VPA. Pet. App. 14a. It explained that 5 U.S.C. 7701(a) strictly limits the MSPB's jurisdiction to those matters contained in the statute, rule, or regulation conferring jurisdiction upon the MSPB. Pet. App. 12a. Because 5 C.F.R. 300.104(a) grants jurisdiction to the MSPB only to consider whether an employment practice complies with the three basic requirements set out in 5 C.F.R. 300.103, the court of appeals found that Section 300.104(a) does not give the board jurisdiction to entertain "any and all legal challenges to employment practices," including petitioners' VPA-based challenge to the 1996 formula. Pet. App. 12a. The Federal Circuit also specifically rejected the MSPB's reliance on 5 U.S.C. 7701(c)(2)(C) as a basis to review the 1996 formula for compliance with the VPA. Pet. App. 12a. Section 7701(c)(2)(C), the court held, may give the board authority to consider whether an

agency action is not in accordance with law, but only as to an action that is within the board's jurisdiction. *Id.* at 12a. It therefore concluded that exercising jurisdiction to entertain an OPM employment practice does not give the MSPB "free-standing jurisdiction" to determine if that employment practice "violates any law whatsoever." *Id.* at 12a-13a, 14a.

Finally, the court of appeals decided OPM's variation was both valid and broad enough to waive compliance with 5 C.F.R. Part 300. Pet. App. 16a. In determining that the variation met all of the requirements to be valid under 5 C.F.R. 5.1, the court specifically found OPM's use of a 70-to-100 point scale instead of a 0-to-100 point scale was consistent with the spirit of 5 C.F.R. 930.203(e). Pet. App. 18a.

In their petition to this Court, the petitioners have not sought review of the aspect of the Federal Circuit's opinion regarding the variation. Pet. I.

ARGUMENT

The Federal Circuit correctly held that the MSPB lacked jurisdiction to hear petitioners' VPA claim. Moreover, petitioners seek review of only one part of the court of appeals' decision, such that even if they prevail on that issue in this Court, they will not have an obvious avenue to obtain the relief they seek. For these reasons, the petition should be denied.

1. The petition should be denied because the Federal Circuit correctly held that the MSPB lacked jurisdiction over petitioners' VPA claim. Neither the statutory scheme controlling the MSPB's jurisdiction nor any of this Court's decisions support petitioners' jurisdictional theory.

a. Unlike Article III courts which exercise jurisdiction over cases arising under federal law, see 28

U.S.C. 1331, and supplemental jurisdiction over certain transactionally-related state law matters, see 28 U.S.C. 1367(a), Congress narrowly and precisely defined the MSPB's jurisdiction in order to effectuate its purpose of ensuring the orderly operation of the civil service system. Consequently, the MSPB's appellate jurisdiction is statutorily limited to matters over which it has been given jurisdiction by "law, rule, or regulation." 5 U.S.C. 7701(a); see *Goines* v. *MSPB*, 258 F.3d 1289, 1292 (Fed. Cir. 2001) (stating that MSPB's jurisdiction is limited to agency actions that are appealable pursuant to a specific "law, rule, or regulation"); *Maddox* v. *MSPB*, 759 F.2d 9, 10 (Fed. Cir. 1985) (same). OPM, the agency charged with prescribing regulations governing the civil service, 5 U.S.C. 1302, has defined the metes and bounds of the MSPB's jurisdiction. Among other things, OPM has stated that the MSPB has jurisdiction with respect to "employment practices." 5 C.F.R. 300.104(a). This jurisdictional grant is limited, however, to claims "that an employment practice which was applied * * * by the Office of Personnel Management violates a basic requirement in 300.103." 5 C.F.R. 300.104(a). Under 5 C.F.R. 300.103, employment practices must: (1) be based on a job analysis; (2) bear a rational relationship between performance in the position to be filled and the employment practice used; and (3) not discriminate. Thus, any claim about an employment practice that is based on something other than a violation of one of the three basic requirements falls outside the MSPB's employment practice jurisdiction.

In this challenge to OPM's addition of veterans' preference points, petitioners invoked the MSPB's employment practice jurisdiction. Pet. App. 37a, 92a. But petitioners do not currently allege that OPM violated

one of the three basic requirements when it added the preference points.[1] Nor could they: By its very nature, the addition of veterans' preference points pursuant to the VPA is a congressionally mandated exception to the merit system. It makes no sense, therefore, to ask whether the addition of preference points satisfies the job analysis, relevance, or equal opportunity requirements. For this reason, the Federal Circuit properly held that the petitioners' challenge to the 1996 formula and their challenge to the addition of preference points are "legally distinct." Thus, because petitioners no longer allege that OPM violated one of the basic requirements, the MSPB lacks jurisdiction to entertain the VPA claim.

b. Petitioners, however, assert that once the MSPB has jurisdiction over an agency decision, then under 5 U.S.C. 7701(c)(2)(C)—which states that the MSPB may not sustain an agency decision that is "not in accordance with law"—the MSPB may not uphold the decision if it is inconsistent with any federal law, in this case, the VPA. See Pet. 20-21. Moreover, petitioners contend, "OPM's regulation authorizing appeal to the MSPB of any employment practice that an employee believes violates the basic requirements of Section 300.103 is merely the vehicle by which MSPB authority to review the agency employment decision attaches. It does not, and cannot, restrict the statutorily defined

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[1] Petitioners alleged before the MSPB that OPM's awarding of preference points violated Section 300.103(c)'s equal employment opportunity requirement. The MSPB rejected that argument noting that preference eligibility is a "congressionally-authorized *exception* to the merit system and competitive examining process." Pet. App. 111a (internal citation and quotations omitted). No party challenged that aspect of the Board's decision in the court of appeals. *Id.* at 14a.

scope of MSPB's authority on appeal." Pet. 21. This interpretation of Section 7701(c)(2)(C) is inconsistent with the statutory scheme.

As the court of appeals explained, far from independently extending MSPB's employment practice jurisdiction to include reviewing agency action for consistency with *every* law, Section 7701(c)(2)(C) merely describes the standard of review the MSPB applies within the confines of its limited jurisdiction. Pet. App. 12a ("The statute that the Board invoked, 5 U.S.C. 7701(c)(2)(C), gives the Board authority to consider whether any agency decision is not in accordance with law, but only with respect to agency decisions that are within the Board's jurisdiction."). In other words, Section 7701(c)(2)(C) instructs the MSPB to invalidate an agency decision that conflicts with agency action properly subject to its jurisdiction. With respect to its employment practice jurisdiction, Section 7701(c)(2)(C) means only that the board may not uphold an employment practice that is inconsistent with one of the basic requirements in 5 C.F.R. 300.103, it does not permit the MSPB to evaluate that practice in light of all federal laws. Indeed, the very purpose of 5 C.F.R. Part 300 (or any other similar jurisdictional statute, regulation, or rule), is to limit the MSPB's jurisdiction by specifically delineating the issues it may review, to the exclusion of all others.[2]

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[2] Nor does the petitioners' analogy to the "not in accordance with law" provision of the Administrative Procedure Act (APA), 5 U.S.C. 706, make the MSPB's interpretation of section 7701(c)(2)(C) any more reasonable. Pet. 24. In *FCC* v. *NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003), this Court stated the APA "requires federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. 706(2)(A) —which means, of course, *any* law, and not merely those laws that

Moreover, petitioners' interpretation has the effect of rendering meaningless every OPM- and congressionally-imposed limit on the MSPB's jurisdiction. After all, if Section 7701(c)(2)(C) permits the MSPB to review agency decisions for consistency with federal law, then 5 C.F.R. 300.104(a) serves no purpose: candidates can simply challenge employment practices under the MSPB's "not in accordance with law" jurisdiction and have no reason to allege a violation of one of 5 C.F.R. 300.103's basic requirements. Petitioners' interpretation of Section 7701(c)(2)(C) as an independent jurisdictional source must also be rejected because it renders superfluous the MSPB's own jurisdictional statute, 5 U.S.C. 7701(a).[3] Because construction of a statute

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the agency itself is charged with administering." *NextWave*, 537 U.S. at 300. In sharp contrast to the strictly limited nature of the MSPB's employment practice jurisdiction under 5 C.F.R. 300.104, a United States District Court's jurisdiction is broadly worded to encompass any claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331. Furthermore, the APA's scope of review section contemplates that the court will decide "all relevant questions of law" and "interpret constitutional and statutory provisions." 5 U.S.C. 706. Neither 5 C.F.R. 300.104 nor 5 U.S.C. 7701(c)(2)(C) contain any language resembling that found in the APA.

To the extent the APA has any bearing, the more instructive case is *Califano* v. *Sanders*, 430 U.S. 99 (1977). In that case, the Court held that Section 10 of the APA, which includes 5 U.S.C. 706, "is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions." 430 U.S. at 105. Just as *Califano* means that Section 706(2)(A)'s "not in accordance with law" language does not independently establish jurisdiction for APA plaintiffs, the Federal Circuit correctly held that Congress's inclusion of the "not in accordance with law" standard in Section 7701(c)(2)(C) does not enlarge the MSPB's jurisdiction.

[3] Petitioners' related claim under 5 U.S.C. 7701(d) does not advance the argument. Pet. 21-22. Section 7701(d) generally pro-

that leaves statutory text "utterly without effect" is "a result to be avoided if possible," *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995), the court of appeals properly held that Section 7701(c)(2)(C) does not enlarge the MSPB's jurisdiction.

c. Nor is there any merit to petitioners' argument that, Section 7701(c)(2)(C) aside, the MSPB has jurisdiction to review the VPA claim under this Court's decisions. First, petitioners maintain that under *USPS* v. *Gregory*, 534 U.S. 1 (2001), the MSPB may review the VPA claim because it is "inextricably intertwined with OPM's adoption of the challenged scoring formula, a question plainly within the scope of the MSPB's jurisdiction." Pet. 18. *Gregory* held that in reviewing a United States Postal Service employee's termination, the MSPB had the authority to review three prior minor disciplinary actions against the employee that were the subject of continuing grievance procedures, even though the MSPB would have otherwise lacked statutory authority to review the prior grievances. The Court explained that "the Board was asked to review respondent's termination, something it clearly has

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vides the Director of OPM with a right to intervene in an appeal before the MSPB if the case involves "the interpretation or application of any civil service law, rule, or regulation" under OPM's jurisdiction. 5 U.S.C. 7701(d)(1). From this, petitioners conclude that "Congress did not intend that proceedings before the MSPB involving the MSPB's determination whether an agency decision is 'not in accordance with law' be limited to review for regulatory error under 5 C.F.R. 300.103." Pet. 22. Of course not. There are many civil service laws, rules, and regulations under OPM's jurisdiction other than 5 C.F.R. 300.103. It is only when the MSPB already has proper appellate jurisdiction to interpret such a law that Sections 7701(c)(2)(C) and 7701(d) would apply. In any event, Section 7701(d) no more expands the MSPB's "employment practice" jurisdiction than Section 7701(c)(2)(C) does.

authority to do. Because this termination was based on a series of disciplinary actions, some of which are minor, the Board's authority to review the termination must also include the authority to review each of the prior disciplinary actions to establish the reasonableness of the penalty as a whole." *Gregory*, 534 U.S. at 9-10 (internal citation omitted). But, unlike the employee's prior disciplinary actions in *Gregory*, the issue of whether the 1996 formula violates the VPA does not "underlie," is not "based on," and clearly is not "inextricably intertwined with," the issue of whether the 1996 formula violates the basic requirements of 5 C.F.R. 300.103. Pet. 17-18. Indeed, while the MSPB's review of the prior disciplinary actions in *Gregory* was essential to determining "the reasonableness of the penalty [i.e., the employee's termination] as a whole," petitioners never even assert that their VPA claim has any relevance whatsoever to adjudicating the matter within the board's jurisdiction; namely, whether the 1996 formula violates any of the basic requirements.

This Court's decisions on the authority of district courts to adjudicate affirmative defenses and counterclaims that do not fall within the courts' original jurisdiction are similarly unpersuasive. Pet. 18-19. For one thing, this authority has been repeatedly described as deriving from the courts' constitutionally based ancillary jurisdiction, now codified at 28 U.S.C. 1367(a). See, *e.g.*, *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 165 (1997); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 375 & n.18 (1978). There is no analogous constitutional or statutory basis for holding that the MSPB, an administrative agency existing outside Article III's purview, may also review claims not included within Congress's delegation of jurisdiction to the Board.

Nor does anything in *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), suggest that every administrative agency has authority to hear counterclaims and affirmative defenses that are not themselves within the agency's original jurisdiction. Rather, *Schor* upheld the Commodity Futures Trading Commission's (CFTC) interpretation of Section 14 of the Commodity Exchange Act (CEA) as permitting it to exercise jurisdiction over state common law counterclaims based on the Court's examination of the CEA and its legislative history and purpose. See 478 U.S. at 841-842. "As our discussion makes manifest," the Court explained, "the CFTC's long-held position that it has the power to take jurisdiction over counterclaims such as Conti's is eminently reasonable and well within the scope of its delegated authority." *Id.* at 844. Because there is no suggestion that Congress similarly delegated to the MSPB the authority to define its own jurisdiction, *Schor* fails to support petitioners' position.[4]

d. Finally, petitioners criticize the Federal Circuit's decision on broader policy grounds that are more appropriately directed to Congress. For example, they claim that denying the MSPB authority to review

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[4] The MSPB's interpretation of Section 7701(c)(2)(C), which the Federal Circuit rejected, is also not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). See Pet. 23-24. First, for the reasons discussed above, see pp. 9-11, *infra*, the MSPB's interpretation of Section 7701(c)(2)(C) is inconsistent with the statutory scheme as a whole and is, therefore, unreasonable. Second, unlike in *Schor*, where the Court deferred to the CFTC's interpretation of its jurisdictional statute because Congress specifically delegated this authority to it, *Schor*, 478 U.S. at 843-844, petitioners never even assert that the board has congressionally-delegated authority to interpret Section 7701(c)(2)(C).

whether agency actions are in accordance with law is contrary to "Congress's intent to channel all challenges to federal agency employment decisions through the MSPB," leaves employees such as petitioners without an avenue of recourse, and allows OPM to "ignore and violate Federal law in setting personnel rules with impunity." Pet. 22, 23 n.4, 28. First, Congress plainly did not intend to channel *all* Federal agency personnel matters to the MSPB, but only those for which it specifically vested jurisdiction in the MSPB. 5 U.S.C. 1204(a)(1), 7701(a). Second, petitioners themselves recognize this Court, in *United States* v. *Fausto*, 484 U.S. 439 (1988), held that the statutory scheme of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, can at times leave a Federal employee without a means of obtaining either MSPB or judicial review of a particular agency action. Pet. 23. In contrast, Congress, in enacting the Veterans Employment Opportunity Act of 1998 (VEOA), Pub. L. No. 105-339, 112 Stat. 3182, specifically provided a "preference eligible" person with a right to seek either administrative review with the Department of Labor and the MSPB or judicial review in a United States District Court to determine if a Federal agency has violated that person's rights "under any statute or regulation relating to veterans' preference."[5] 5 U.S.C. 3330a, 3330b. To the extent non-preference eligible persons such as peti-

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[5] The VEOA directly refutes petitioners' contention that "[n]othing would prevent [OPM] * * * from implementing yet another scoring formula that could, at the whim of OPM, diminish the value or entirely eliminate the use of veterans' preference points." Pet. 16. If OPM ever were to implement such a scoring formula, the VEOA undeniably would give any "preference eligible" person affected by the formula the right to challenge that action either administratively or judicially.

tioners lack a similar right of review, and to the extent certain OPM employment actions may not be subject to judicial review, this is the result of the statutory framework Congress has devised. The fact remains that no statute, regulation, or rule confers jurisdiction upon the MSPB to consider the petitioners' challenge to the 1996 formula based upon the VPA.

2. This Court should reject the petition for the additional reason that the Federal Circuit's unchallenged holding that OPM's regulatory variation was lawful combined with the statutorily-required preference formula renders petitioners without an obvious avenue to obtain the relief they seek. Here, petitioners allege only that OPM's use of the 1996 formula—which changed the ALJ scoring by assigning a passing score of 70 to any applicant who meets the minimum employment qualifcations (and completes the remaining four parts of the exam) and attributes the remaining 30 points to the applicant's score on the four-part exam —"substantially increased the weight" of veterans' preference points because those points are added to the "new 30-point scale" as opposed to the previous 100-point scale that petitioners contend is required by the VPA. Pet. 9-10. Petitioners further allege that the addition of the allegedly over-weighted veterans' preference points harmed them by allowing all preference eligibles to leapfrog to the top of the ALJ list.

However, petitioners did not seek review of the Federal Circuit's decision holding that OPM did not abuse its discretion in granting itself a variation from 5 C.F.R. 930.203(e) to change from a 0-100 point scale to a 70-100 point scale. Pet. App. 18a. That aspect of the court's ruling is now final. See, *e.g.*, *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 802 (1988) (law of the case doctrine "expresses the practice of

courts generally to refuse to reopen what has been decided"); *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950) (under law of the case doctrine, "when an issue is once litigated and decided, that should be the end of the matter"). Accordingly, petitioners could only obtain relief by reducing the amount of veterans' preference to account for the truncated scoring system. But this relief is precluded because Congress specifically directed that preference eligibles should receive, depending on their disability status, 10 or 5 points, and neither the courts nor OPM can alter that statutory command. See 5 U.S.C. 3309.[6]

Thus, having failed to challenge the Federal Circuit's regulatory variation holding, petitioners have no obvious avenue to obtain the relief they seek. This Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and does not ordinarily "decide questions that cannot affect the rights of litigants in the case before them," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions."); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) (The Court's "power is to correct wrong judgments, not revise opinions."). Here, the unchallenged ground of the court of appeals' judgment would preclude effective review even if the Court were to grant review and resolve all of the questions presented

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[6] This is not to suggest that a remedy is not possible, just that in light of the statutorily-fixed nature of the veterans' preference, petitioners' failure to pursue a challenge to the move to a 70-100 point system precludes effective relief.

in petitioners' favor. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 2004

Supreme Court, U.S.
FILED
FEB 9 - 2004
OFFICE OF THE CLERK

No. 03-624

In The
Supreme Court of the United States

ANN S. AZDELL AND DONALD B. FISHMAN,

Petitioners,

v.

KAY COLES JAMES, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

A. Respondents Do Not Dispute The Importance Of The MSPB's Authority At Issue Here

The Solicitor General does not dispute the importance of this case, which involves the authority of respondent Merit Systems Protection Board (MSPB) to review the practice used by respondent Office of Personnel Management (OPM) to rank applicants for positions as federal administrative law judges (ALJs). Whether the OPM's practice violates the Veterans' Preference Act (VPA) is important to the integrity of the adjudication process throughout numerous federal agencies, and whether that practice is subject to review by the MSPB and to judicial review is necessarily significant as well.

Indeed, respondent OPM made clear to the court of appeals that this case "presents a serious and substantial question of law that will have recurring importance." Pet. App. 26a. The individual respondents do not appear to dispute that assessment. *See* Meeker *et al.* Br. in Opp. 1-9.

Because the Federal Circuit is the only court of appeals with the authority to address the question presented, respondents cannot, and do not, suggest that the Court await further legal developments in the lower courts. Moreover, further review by this Court would be particularly appropriate in this case because the Solicitor General takes the position that the court of appeals correctly restricted the jurisdiction of respondent MSPB, which is "an independent Government agency that operates like a court," 5 C.F.R. § 1200.1, and was established by Congress to ensure that the other federal respondent before this Court, the OPM, complies with federal law.[1] The Solicitor General suggests in a

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[1] The caption of the Solicitor General's brief indicates that it was filed on behalf of only one federal "Respondent" – the OPM – and not on behalf of the MSPB. As explained in our petition, however, Pet. ii, the MSPB is also a respondent before this Court pursuant to this Court's Rule 12.6. *See also* 5 U.S.C. § 7703(d) (in appeal brought by OPM in Federal Circuit, the MSPB "and all other parties to the proceedings before the [MSPB] shall have the right to appear in the proceeding

(Continued on following page)

footnote that the MSPB's consistent interpretation of 5 U.S.C. § 7701 for more than 20 years be rejected as unreasonable, but does so without addressing the contrary reasoning of the MSPB that was set forth in the MSPB's prior adjudicatory decisions and its petition for rehearing *en banc* to the court of appeals. *See* OPM Br. in Opp. 14 n.4; Pet. App. 146a-164a (reprint of MSPB's rehearing *en banc* petition).

B. The OPM's Arguments Demonstrate The Need For Further Review Because They Are Contrary To The Statute, The MSPB's Interpretation, And The Presumption Favoring Judicial Review, And Would Have Broad Adverse Consequences For MSPB Authority

1. Respondent OPM devotes the bulk of its brief to the merits of petitioners' case (OPM Br. in Opp. 7-16), thereby confirming the importance of the question presented. The OPM contends that the Federal Circuit correctly held that the MSPB lacked jurisdiction over petitioners' argument that the OPM's 1996 scoring formula violated the VPA, 5 U.S.C. § 3309 *et seq*. The OPM argues that, although Congress granted the MSPB appellate jurisdiction over "any action which is appealable to the [MSPB] under any law, rule, or regulation," 5 U.S.C. § 7701(a), that grant of jurisdiction is somehow limited to addressing only arguments that claim a violation of the regulation that gave rise to the jurisdiction. OPM Br. in Opp. 8, 10, 11. That interpretation wholly disregards the statutory scheme established by Congress to govern the standard of review in MSPB appeals.

a. The OPM repeatedly confuses the appellate jurisdiction that Congress established for the MSPB in 5 U.S.C. § 7701(a) and (b), with the standard of review in 5 U.S.C.

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before the Court of Appeals"); Pet. App. 25, 146a-164a (participation by the MSPB as respondent before the Federal Circuit); 5 U.S.C. § 1204(i) (the MSPB has independent litigating authority only in lower courts, not in the Supreme Court).

§ 7701(c), that Congress directed the MSPB to apply to appeals properly before it. *See* OPM Br. in Opp. 8-12. Section 7701(c) is not a source of jurisdiction, nor do petitioners claim that it is, as the OPM suggests. Br. in Opp. 11 & n.2.

Congress addressed the MSPB's appellate jurisdiction in subsection (a) of 5 U.S.C. § 7701 by specifying that an employee or applicant for employment "may submit an appeal" to the MSPB "from any action which is appealable" to the MSPB "under any law, rule, or regulation." 5 U.S.C. § 7701(a). In subsection (b), Congress further provided that the MSPB may hear "any case appealed to it" or, in some instances, may refer the case to another designated official. *Id.* § 7701(b)(1).

Congress turned to the standards of appellate review in subsection (c) of Section 7701. First, Congress provided that the MSPB can sustain an agency decision only if it is supported by substantial evidence, *id.* § 7701(c)(1)(A), or by a preponderance of the evidence, *id.* § 7701(c)(1)(B), depending on the type of agency action appealed. Second, Congress directed that, even if an agency decision meets the threshold standard, the agency decision nonetheless "may not be sustained" by the MSPB if the employee or applicant makes any of the following three showings: (A) that there was "harmful error in the application of the agency's procedures in arriving at such decision;" (B) that the decision was based on a prohibited personnel practice described in 5 U.S.C. § 2302(b) (including discrimination, nepotism, and coercion of political activity); or (C) that "the decision was not in accordance with law." *Id.* § 7701(c)(2)(A), (B), (C).

As the Federal Circuit concluded, Pet. App. 9a, petitioners clearly met the jurisdictional requirements of subsection (a) for submitting an appeal to the MSPB because their appeal was from an action that was appealable under a regulation – 5 C.F.R. § 300.104(a). Section 300.104(a) unequivocally states that "[a] candidate who believes that an employment practice which was applied to him or her by the [OPM] violates a basic requirement in § 300.103 is entitled to

appeal to the [MSPB] under the provisions of its regulations."[2] The OPM does not dispute that petitioners believed that the challenged employment practice – the 1996 scoring formula – violated the basic requirements of § 300.103 and properly appealed to the MSPB. OPM Br. in Opp. 4, 9 n.1. The OPM nonetheless claims that, once the appeal reached the MSPB, the MSPB could not review the employment practice under the standards set forth by Congress in Section 7701(c)(2)(C).[3]

The OPM attempts to curtail the jurisdiction of the MSPB by arguing that, once appealed under 5 C.F.R. § 300.104(a), the MSPB could review the employment practice only to determine compliance with the basic requirements of 5 C.F.R. § 300.103. OPM Br. in Opp. 9-10. But that interpretation disrupts the entire statutory scheme of appellate review established by Congress in Section 7701(c). It would require the MSPB to sustain on appeal OPM decisions that are not in accordance with other laws that govern the OPM (such as the VPA), despite the unequivocal congressional mandate that the MSPB not sustain agency decisions that are not in accordance with law. *See* 5 U.S.C. § 7701(c)(2)(C).

Moreover, the OPM offers no reason to distinguish the "not in accordance with law" review under Section 7701(c)(2)(C), from review under Sections 7701(c)(2)(A) or

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[2] The basic requirements in Section 300.103 are that an employment practice be based on a specified type of job analysis, be professionally developed and rationally related to performance in the position, and not discriminate on the basis of nonmerit factors. 5 C.F.R. § 300.103.

[3] The OPM's later argument (OPM Br. in Opp. 11-12) that petitioners' interpretation means that 5 C.F.R. § 300.104(a) "serves no purpose" because candidates can appeal under that provision without alleging a violation of the basic requirements regulation, 5 C.F.R. § 300.103, is simply wrong. That is not what occurred in this case and, as explained above, cannot occur in other cases because an appeal may be submitted to the MSPB only from an action that is appealable under a law, rule or regulation, including under 5 C.F.R. § 300.104(a), in which instance there must be a belief that an employment practice violated 5 C.F.R. § 300.103.

(B). The OPM's argument would require the MSPB to sustain an agency decision even if there was "harmful error in the application of the agency's procedures in arriving at such decision," 5 U.S.C. § 7701(c)(2)(A), so long as the error was not also a violation of the basic requirements regulation, 5 C.F.R. § 300.103.

The OPM's interpretation also would require the MSPB to sustain an employment practice that was based on a "prohibited personnel practice," 5 U.S.C. § 7701(c)(2)(B), such as coercing the political activity of a person or obstructing a person's right to compete for employment, *see* 5 U.S.C. § 2302(b)(3) &(4), because such grounds are not prohibited by the basic requirements regulation, 5 C.F.R. § 300.103.

The OPM's argument is, in essence, that the MSPB must sustain on appeal OPM actions that are unlawful both procedurally and substantively, so long as they do not violate 5 C.F.R. § 300.103 – a regulatory provision that the court of appeals found the OPM is free to waive at its discretion. Pet. App. 18a. That interpretation would immunize the OPM's actions from much independent review – a result that may well serve the OPM's parochial institutional interests, but is not what Congress intended.

Indeed, the OPM's interpretation, which the Federal Circuit embraced, may have even wider ranging consequences for the authority of the MSPB over OPM actions because neither the OPM nor the Federal Circuit provides any rationale for distinguishing between appeals to the MSPB under 5 C.F.R. § 300.104(a), and appeals to the MSPB under any other law, rule, or regulation. *See* Pet. 10. The OPM disregards the fact that the MSPB is authorized to hear appeals submitted under at least 20 other different laws, rules, and regulations, including several federal statutes. *See* 5 C.F.R. § 1201.3(a)(1)-(21). The OPM does not explain why its interpretation would not mean that, in each of those instances, the statute or regulation authorizing appeal would also limit the standard of appellate review, thereby leaving Section 7701(c) with no role in the process, clearly contrary to Congress's intent.

b. The OPM unsuccessfully attempts to resolve the conflict between the decision below and this Court's decision in *USPS v. Gregory*, 534 U.S. 1 (2001). The OPM suggests (OPM Br. in Opp. 13) that *Gregory* can be read to limit the appellate review authority of the MSPB to review of predicate agency actions only when such review is "essential" to determining the validity of the challenged agency decision as a whole. But, of course, review of the validity of the OPM's 1996 scoring formula under the VPA is essential to determining the validity of the formula as a whole. In any event, the OPM's proposed restriction on *Gregory* is not rooted in the language of the Court's decision or in any statutory text.

The more natural reading of *Gregory* is that Section 7701 grants the MSPB authority to review the entirety of a case that has been properly appealed to it. Indeed, that is consistent with the Solicitor General's view in *Gregory* that, "[t]o enable the MSPB to fulfill [its] 'watch dog' role, Congress gave the Board 'primacy' over the 'administrative resolution of disputes over adverse personnel action,' and vested it with broad adjudicatory powers." Br. for Pet. at 17, *USPS v. Gregory*, No. 00-758 (Apr. 2001) (citations omitted). *Cf. FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 304 (2003) (interpreting "not in accordance with law" language in Administrative Procedure Act to permit a court to review action by the FCC for compliance with the bankruptcy code, a law the FCC was not charged with administering).

2. The Court's review is particularly warranted in this case because the Solicitor General's adoption of the OPM's interpretation leads him to urge abandonment of the MSPB's longstanding and consistent statutory interpretation, without adequate analysis of the wide-ranging consequences discussed above. The Solicitor General's choice between the views of competing federal entities does not, of course, bind this Court. *See St. Regis Paper Co. v. United States*, 368 U.S. 208, 217 (1961).

The MSPB has consistently read 5 U.S.C. § 7701(c)(2)(C) to prohibit it from sustaining on appellate review an agency decision that is "not in accordance with law." As we demonstrated in the petition, the MSPB's interpretation has been

reflected in adjudications dating back more than 20 years. Pet. 25-26 n.5. The OPM does not dispute the existence of this longstanding interpretation. And it conceded below that the Federal Circuit's opinions previously had adopted the same view. Pet. 27-28 & n.6.

The OPM now suggests (OPM Br. in Opp. 14 n.4), however, that the MSPB's interpretation is not entitled to judicial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), not just because it conflicts with the OPM's reading of the statute, but also because Congress did not specifically delegate to the MSPB the authority to interpret Section 7701(c). *See also* Meeker *et al.* Br. in Opp. 5-6. But Congress clearly intended the MSPB to interpret Section 7701(c) through formal appellate adjudicatory procedures. *See* 5 U.S.C. §§ 1204(a)(1), 7701(b)(1).

The Court recently confirmed in *United States v. Mead Corp.*, 533 U.S. 218, 229-230 (2001), that *Chevron* deference is granted to such agency views that are generated through formal adjudication when the statute contains express congressional authorizations to engage in such adjudication. Indeed, the Solicitor General previously explained that Congress intended the MSPB's "case law" to be entitled to judicial deference and that a party "accordingly bears an extremely heavy burden in establishing that a court should substitute its judgment for that of the agency." Br. for Pet. at 17-18, 29, *USPS v. Gregory*, No. 00-758 (Apr. 2001).[4]

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[4] The Solicitor General suggests at one point (OPM Br. in Opp. 14) that an agency's views regarding its own jurisdiction are not entitled to deference, but that view has not been adopted by the Court. *See Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 453 (1999) (granting *Chevron* deference to agency's interpretation of statute that authorizes appeals to administrative board); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 380-382 (1988) (Scalia, J., concurring in the judgment) (collecting cases). Such an argument also is contrary to the views expressed by the United States on numerous previous occasions. *See, e.g.*, Br. for Pet. at 49, *INS v. St. Cyr*, No. 00-767 (Feb. 2001); Br. in Opp. 11 n.3, *Shelton v. CPSC*, No. 02-15 (Oct.

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3. The OPM acknowledges (Br. in Opp. 15-16) that the Federal Circuit's and its own interpretation of 5 U.S.C. § 7701, may lead to "certain OPM employment actions * * * not be[ing] subject to judicial review." That situation is contrary to the "'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action'" which has led this Court to "find an intent to preclude such review only if presented with '"clear and convincing evidence."'" *Reno v. Catholic Social Servs.*, 509 U.S. 43, 63-64 (1993) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991), and *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

Because MSPB review is a necessary predicate to judicial review of this type of civil service challenge to OPM employment practices, *see United States v. Fausto*, 484 U.S. 439 (1988), that presumption in favor of judicial review must also favor a reading of MSPB's authority to allow it to review the legality of such practices. Yet under the Federal Circuit's interpretation, the MSPB and the Federal Circuit lack authority to review the OPM's compliance with federal law and must sustain the decision even when they otherwise have jurisdiction to adjudicate the validity of an OPM employment practice. Such an interpretation is strongly disfavored.[5]

2002); Br. in Opp. 8 n.6, *United Transp. Union v. Slater*, No. 98-627 (Dec. 1998).

[5] The OPM contends (OPM Br. in Opp. 15-16) that leaving employees and applicants such as petitioners without an avenue for administrative or judicial review of OPM employment actions is part of Congress's intended statutory framework as reflected in the Veterans Employment Opportunity Act of 1998 (VEOA), 5 U.S.C. § 3330a. But Congress provided that the VEOA's complaint mechanism "shall not be construed to prohibit a preference eligible [veteran] from appealing directly to the Merit Systems Protection Board from any action which is appealable to the Board under any other law, rule, or regulation, in lieu of administrative redress under this section." 5 U.S.C. § 3330a(e)(1) (Supp. 2003). This provision would make no sense unless Congress believed the MSPB already had jurisdiction over claims that agency decisions violated the VPA.

C. Reversal Of The Federal Circuit's Erroneous Jurisdictional Ruling Will Allow Petitioners To Pursue Complete Relief On Remand

The OPM erroneously contends in closing (Br. in Opp. 7, 16-18) that *certiorari* should not be granted because petitioners do not have an "obvious" means of prevailing on the merits even if the Court reverses the Federal Circuit's holding regarding jurisdiction. The OPM mistakenly believes that, because petitioners did not also seek review by this Court of the Federal Circuit's ruling that an OPM variation acted to waive the basic requirements of 5 C.F.R. § 300.103, petitioners would not be able to obtain relief even if this Court grants review and rules in petitioners' favor.

The variation that the OPM granted itself under 5 C.F.R. § 5.1 is a mechanism that the OPM is authorized to use to waive "the strict letter of [OPM's] regulation[s]" in certain limited circumstances. But the OPM has no authority to grant itself a variation from the statutory requirements of the VPA. Once the OPM elected to use an examination to select ALJ's, *see* Pet. App. 66a-67a, 70a, its conduct was governed by the VPA, 5 U.S.C. § 3309 (1996 & Supp. 2003), which provides that a veteran "who receives a passing grade in an examination" is entitled to receive 5 or 10 "additional points above his earned rating." The MSPB correctly concluded, based on the statutory text and history, that OPM's 1996 scoring formula violates the VPA in two ways. First, the VPA requires that a veteran's preference points be added only "above his earned rating," such that the OPM's 1996 scoring formula violates the statute because it grants 70 *unearned* points to every applicant who completes the examination, regardless of performance, and it imposes the veteran preference points as additional points above that unearned rating. *See* Pet. App. 89a-90a, 109a-110a. Second, and relatedly, the MSPB concluded that Congress intended that veteran preference points be awarded "based on a 100-point scale" of earned points. *Id.* at 89a. The MSPB correctly found that the OPM's 1996 scoring formula, by contrast, unlawfully used only a 30-point scale of earned points. *Id.* at 90a; *see also* Meeker *et al.* Br. in Opp. 1 (explaining that applicants were "given a weighted score based on a range of

0 to 30 points"); OPM Br. in Opp. 7, 16 (describing Federal Circuit as upholding 70 to 100 point scale).

The Federal Circuit failed to address the merits of that ruling due to its erroneous holding that the MSPB lacked jurisdiction to review the argument. If this Court grants review, reverses the Federal Circuit, and remands the case, petitioners will again urge the Federal Circuit to sustain the MSPB's holding that the OPM's 1996 scoring formula was not in accordance with the VPA. If the Federal Circuit so rules, the OPM's 1996 scoring formula will be invalid as a matter of law and cannot be used unlawfully to determine the ranking of candidates for federal ALJ positions. The OPM's variation from certain of its own regulatory requirements could not negate the force of such a judicial ruling. Petitioners would then be entitled to the relief they have always sought and that the MSPB ordered – a proper scoring formula that does not violate the VPA.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted.

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